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Vendor's Privilege: *Adheret Visceribus Rei*

L. David Cromwell*

As the price for an immovable, a purchaser assumed payment of the seller's debt that was secured by an existing mortgage that the seller had granted a year earlier. More than ten years after recordation of the mortgage, but less than ten years after the act of sale was recorded in the mortgage records, a judgment creditor of the purchaser seized the immovable, arguing that the mortgage had lost its effectiveness for failure of timely reinscription. Unfortunately for the judgment creditor, however, she had overlooked a powerful security device that resulted by operation of law from the purchaser's assumption of the mortgage debt: the vendor's privilege. Affirming a ruling that the immovable remained subject to this vendor's privilege, the Louisiana Supreme Court held it to be wholly immaterial whether the mortgage was reinscribed in a timely manner or whether the mortgage was recorded at all, for the failure of timely reinscription of the mortgage did not affect the vendor's privilege that arose from the assumption in the act of sale "as a legal concomitant . . . without the requirement of any stipulation at all."¹ As authority for this proposition, the Court cited, without translation, an obscure Latin maxim: *Adheret visceribus rei*.

The Court's use of this Latin expression certainly suggests that the security device known as the vendor's privilege, like many other creatures of the civil law, originated in Roman law. Indeed, support for that proposition can be inferred from *Baker v. Frellsen*,² in which the Louisiana Supreme Court a year earlier invoked the same Latin phrase, in the process providing both a translation and an apparent indication that the vendor's privilege finds its source in Roman law:

[The vendor's privilege] is a guarantee which attaches so tenaciously to the nature of the contract of sale on term,

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* Member, Louisiana Bar, and Vice President and Member of the Council of the Louisiana State Law Institute, as well as Reporter of its Security Devices Committee. J.D., 1983, Tulane University of Louisiana. This Article is derived from, and expands upon, a paper presented by the author to the Society of Bartolus in New Orleans, Louisiana, on October 12, 2012. The author expresses appreciation to Professors A.N. Yiannopoulos and Dian Tooley-Knoblett, both of whom were in attendance when the paper was presented, for their thoughtful comments and suggestions, and to Claire Popovich for her able research assistance.

1. Conté v. Cain, 33 La. Ann. 965, 968 (1881).
2. 32 La. Ann. 822 (1880).

that the Roman law says that it adheres to the very entrails of the thing, *adheret visceribus rei*.³

Objection might be made to this statement on the ground that it, unfortunately, is without basis in historical fact and appears to have arisen from a mistaken belief that Latin words necessarily imply roots in Roman law. Indeed, the Supreme Court recanted just two years later in *De L'Isle v. Succession of Moss*,⁴ explaining, in a footnote, that the use of the word "Roman" in the *Baker* case was in error; instead of Roman law, the reference was intended to be "*modern civil*" law. The Court acknowledged that the vendor's privilege was unknown to Roman law but rather is of Gallic creation.

Whatever its origin, the vendor's privilege has been a coveted and powerful form of security throughout Louisiana's history. This Article begins with a short excursus recalling some central notions about the definition and nature of privileges and posits that there actually exist two different vendor's privileges: the vendor's privilege on movables and that bearing on immovables. After tracing the origin of both of these vendor's privileges, this Article explores the policies underlying the privileges, requirements of registry, status of the privileges as real rights, events causing a loss of the privileges, and problems involving ranking. By focusing on the vendor's privilege as an example, this Article seeks to illustrate, from a broader perspective, the reasons for the existence of privileges, the manner in which they relate to each other and to other forms of security, and the extent to which privileges can remain relevant in a modern civil law system.

I. GENERAL NOTIONS OF PRIVILEGE

Article 3186 of the Louisiana Civil Code, which was borrowed verbatim from the *Code Napoléon*,⁵ provides that "[p]rivilege is a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages."⁶ A privilege is thus a preference established by legislation and is an exception to the general rule of the Civil Code that the proceeds of the sale of an obligor's property are distributed ratably among his creditors.⁷ A privilege is a form of real security.⁸

3. *Id.* at 828.

4. 34 La. Ann. 164, 166 (1882).

5. See CODE CIVIL [C. CIV.] art. 2095 (Fr.) (1804).

6. See LA. CIV. CODE art. 3186 (2015).

7. LA. CIV. CODE art. 3134 (2015). As comment (a) to that article explains, this rule continues the familiar principle of article 3183 of the Louisiana Civil

Privileges cannot be granted contractually; they can arise only by operation of law based upon the nature of the debt.⁹

Planiol defines a *privilège* as “a disposition of the law which favors a creditor.”¹⁰ This definition not only underscores the rule that privileges arise only by operation of law but is true to the term’s Latin etymology—law made for private or particular interests: *privilegium*, from *privus* - *legis*.¹¹

Some privileges are general and operate on all property of the debtor, such as those securing funeral charges, law charges, and expenses of the last illness.¹² Other privileges are special; that is, they operate only on specific property. One of the most important special privileges is that in favor of the vendor as security for the unpaid purchase price. The law itself grants the unpaid vendor this privilege; it is unnecessary for the vendor to obtain a mortgage, or even to obtain written recognition of the existence of the vendor’s privilege, for it to arise.¹³

The definition of “privilege” contained in article 3186 has been criticized on the ground that it envisions merely rights of preference that exist upon property while in the debtor’s patrimony and that the general privileges comprise the only category of

Code of 1870 that “the property of the debtor is the ‘common pledge of his creditors.’” *Id.* cmt. a. The reference in the source article to the concept of “pledge” was deleted, because the term was used in that article in a “non-technical sense.” *Id.*

8. LA. CIV. CODE art. 3137 cmt. c (2015). The fact that a privilege is a form of real security does not necessarily mean that it is a real right. *Id.*

9. See LA. CIV. CODE art. 3185 (2015); see, e.g., *Southport Petroleum Co. of Del. v. Fithian*, 13 So. 2d 382, 383 (La. 1943); *In re Liquidation of Hibernia Bank & Trust Co.*, 162 So. 644, 645 (La. 1935); *State v. Miller*, 126 So. 422, 428 (La. 1930); *Succession of Rousseau*, 23 La. Ann. 1, 3 (1871).

10. 2 MARCEL PLANIOL & GEORGES RIPERT, TREATISE ON THE CIVIL LAW, pt. 2, No. 2544 (La. State Law Inst. trans., 11th ed. 1959) (1939).

11. LE PETIT LAROUSSE ILLUSTRÉ 822 (Larousse 2010).

12. LA. CIV. CODE arts. 3191, 3252 (2015). The need for explanation of the reasons for the existence of privileges has often afforded courts the opportunity to demonstrate their prowess in the use of poetic and figurative language, as evidenced by an early case providing this moving explanation for the privilege for funeral charges:

[W]ere it not for the privilege which the law allows to those who dig the grave, furnish the coffin and drive the hearse, many a lifeless frame, deprived of sepulture, would rot in unnoted or forsaken homes. Were it not for that privilege, when Death enters a city and knocks at every door-watchful and indefatigable as it is, Charity would inevitably be unequal to the increased task which—otherwise—would be imposed upon it.

Alter v. O’Brien, 31 La. Ann. 452, 454 (1879).

13. *Conté v. Cain*, 33 La. Ann. 965, 968 (1881).

privileges that truly fits within this definition, even though the Code establishes other privileges, such as the special privileges on immovables, that include a right of pursuit in addition to a mere right of preference.¹⁴ It is asserted that those privileges constitute real rights that are inconsistent with the definition given in article 3186.¹⁵ The degree to which vendor's privileges can be viewed as real rights will be explored in substantial detail below.

Among two or more competing privileges, the general rule is that they rank according to their nature rather than the date on which they arise.¹⁶ Privileges that are of the same rank are paid concurrently from the proceeds of the thing that they burden.¹⁷ These general rules are applied consistently only to privileges burdening movables,¹⁸ though there are instances under Louisiana law in which they continue to apply to immovables.¹⁹

The last phrase of article 3186 is critical, for it contains the general rule of ranking of privileges upon immovables against mortgages. By their nature, privileges are preferred to mortgages, regardless of whether the mortgage may have previously arisen or become effective against third persons, unless some other provision of law provides to the contrary.²⁰ It is for this reason that the general privileges that arise under the Civil Code outrank mortgages.²¹ Nevertheless, in order for

14. 2 BERNARD KEITH VETTER & THOMAS A. HARRELL, *LOUISIANA CREDITORS' SECURITY RIGHTS* 154, 241–43 (1988). *See also* PLANIOL & RIPERT, *supra* note 10, No. 2547 (observing that there are no general characteristics of privileges, except in the case of general privileges).

15. VETTER & HARRELL, *supra* note 14, at 243.

16. LA. CIV. CODE art. 3187 (1870).

17. LA. CIV. CODE art. 3188 (1870).

18. *See* 8 ROBERT BEUDANT & PAUL LEREBOURS-PIGEONNIERE, *COURS DE DROIT CIVIL FRANÇAIS* § 325 (11th ed. 1948).

19. *See, e.g.*, LA. CIV. CODE arts. 3254–3270 (1870). A more modern example is found in the Private Works Act, which ranks privileges arising under its provisions by nature among themselves but by priority in time against mortgages and vendor's privileges. *See* LA. REV. STAT. ANN. § 9:4821 (Supp. 2015).

20. *See* 3 C. AUBRY ET C. RAU, *COURS DE DROIT CIVIL FRANÇAIS* § 290 (6th ed. 1938). There are many exceptions to the general rule, such as the ranking provisions of the Louisiana Private Works Act, in Louisiana Revised Statutes section 9:4821. Some French writers assert that the traditional rule that privileges by their nature outrank mortgages has been rendered illusory by the requirement of inscription, which now determines ranking for most privileges and mortgages alike. *See* BEUDANT ET AL., *supra* note 18, §§ 319–22.

21. LA. CIV. CODE art. 3269 (1870). Under Roman law, general privileges ranked behind mortgages. The policy reason for reversing the ranking so that mortgages rank behind general privileges has been explained by the fact that the holders of general privileges usually have small claims that would often not be paid if those privileges ranked behind mortgages. PLANIOL & RIPERT, *supra* note 10, Nos. 2628–2631. *See also* VETTER & HARRELL, *supra* note 14, at 299.

most privileges upon immovables to enjoy this favored ranking, the acts that evidence them must be filed for record within the period prescribed by Civil Code article 3274.²² If the act evidencing a privilege is not filed within that time, it takes effect against third persons from the date of registry and affords the holder of the privilege no preference over previously recorded mortgages.²³ As will be seen, these rules are of particular importance when applied to the vendor's privilege on immovables.

It is fitting that the vendor's privilege on movables²⁴ and that on immovables²⁵ arise under different articles of the Louisiana Civil Code, for they are actually entirely different privileges. If these two privileges can be seen as twins that share the same family name and several common attributes, they are fraternal twins at best, for they were born at different times and of different sources. Moreover, apart from the obvious difference in the domain of things upon which they operate, they are wholly different in their status as real rights, the means by which they are made enforceable against third persons, and their ranking against competing interests.

II. THE GENESIS OF VENDOR'S PRIVILEGES

At Roman law, no privilege existed in favor of the vendor.²⁶ However, no privilege was necessary, for so long as the price was unpaid, the vendor remained the owner of the thing.²⁷ Indeed, it was impossible for the vendor to hold a privilege, because a person cannot have a privilege on his own property.²⁸ As owner, the seller could revendicate the thing sold if he was not paid; however, revendication was unavailable if the vendor agreed to allow the vendee a term for payment of the price, because ownership transferred immediately to the vendee. In that case, the vendor was deemed to have trusted in the faithfulness of the buyer and held the status of only an ordinary creditor if the price was not paid when due.²⁹

22. The period is 7 days if the property is located in the same parish where the act was passed; otherwise, it is 15 days. LA. CIV. CODE art. 3274 (2015).

23. *Id.*

24. LA. CIV. CODE arts. 3217(7), 3227 (2015).

25. LA. CIV. CODE art. 3249(1) (2015).

26. 21 G. BAUDRY-LACANTINERIE & P. DELOYNE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, DU NANTISSEMENT, DES PRIVILÈGES ET HYPOTHÈQUES ET DE L'EXPROPRIATION FORCÉE*, TOME PREMIER No. 484 (2d ed. 1899).

27. See BEUDANT ET AL., *supra* note 18, § 508; PLANIOL & RIPERT, *supra* note 10, No. 2604.

28. BEUDANT ET AL., *supra* note 18, § 508.

29. PLANIOL & RIPERT, *supra* note 10, No. 2604; BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 484; BEUDANT ET AL., *supra* note 18, § 508. Modern

For centuries, France followed these rules: the vendor under a sale without a term for payment of the price could avail himself of the right of revendication if the vendee failed to pay the price.³⁰ The vendor under a sale on term was relegated to a personal action.³¹ In time, the vendor's privilege arose as a creature of customary law.³² Beginning in the 16th century, vendors of movables began to introduce a new practice to protect themselves—the thing sold was delivered under a precarious title, such as a fictitious lease. Because this kind of transaction did not transfer ownership, the vendor remained protected to the same extent as if he had sold without a term. Over time, this practice blurred the distinction between a sale on term and a sale without a term, and this distinction became viewed as a mere “subtlety.”³³ The revision of the *Coutume de Paris* in 1580 introduced a new article providing that, when the thing sold is seized by another creditor of the vendee, the vendor can prevent the sale and “is preferred on the thing to the other creditors.”³⁴ This same article was reproduced literally in the *Coutume d'Orléans* in 1583.³⁵ It is noteworthy that the word *privilège* was not expressly used;³⁶ however, the concept proved so useful that it was adopted by the jurisprudence even in those parts of the country that otherwise followed the written law based on Roman tradition.³⁷

continental civil codes based on the German model continue to follow the Roman rule without establishing a privilege in favor of the vendor.

30. This right was expressly recognized in the *Coutume de Paris* article 176 (1580): “*Qui vend aucune chose mobilière sans jour & sans terme esperant estre payé promptement, il peut la chose poursuivre en quelque lieu qu'elle soit transportée, pour estre payé du prix qu'il l'a vendue.*” 1 CLAUDE DE FERRIÈRE, NOUVEAU COMMENTAIRE SUR LA COUTUME DE LA PREVOSTE ET VICOMTE DE PARIS 370 (2d ed. 1688).

31. PLANIOL & RIPERT, *supra* note 10, No. 2605.

32. See BEUDANT ET AL., *supra* note 18, § 508; HARRIET SPILLER DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE § 33, at 91 (1942).

33. PLANIOL & RIPERT, *supra* note 10, No. 2606.

34. *Coutume de Paris* article 177 (1580): “*Et néanmoins encore, qu'il eût donné terme, si la chose se trouve saisie sur le débiteur par autre créancier, il peut empêcher la vente, et est préféré sur la chose aux autres créanciers.*” See FERRIÈRE, *supra* note 30, at 374 (author's translation). Ferrière explains that the *Coutume* gives to the unpaid seller, who is a privileged and preferred creditor, a special mortgage on the thing as security for the payment of the price. *Id.* at 375.

35. PLANIOL & RIPERT, *supra* note 10, No. 2606.

36. Planiol observes that, when Pothier and Ferrière would speak of this right, they would refer to it alternately as either *hypothèque* or *privilège*. *Id.*

37. See Bessie Margolin, *Civil Law: Vendor's Privilege*, 4 TUL. L. REV. 239, 242 n.12 (1929) (quoting X PAUL PONT, EXPLICATION THEORIQUE ET PRATIQUE DU CODE CIVIL § 146 (3d ed. 1883)). See also DAGGETT, *supra* note 32, § 4. Those areas of France that followed the customary law recognized first the existence of a vendor's privilege in the case of all sales without a term and

At this point in history, however, the birth of the vendor's privilege on movables was yet incomplete. There remained a strict dichotomy between rights of the vendor under a sale without a term and those of the vendor under a sale with a term. The former still had the right of revendication; the latter had what became known as a vendor's privilege. Ultimately, the evolving jurisprudence removed this distinction by confining to a very short period of time the delay within which the vendor under a sale without a term was permitted to exercise his right of revendication. If he delayed beyond that time, he was viewed as having tacitly agreed to payment of the price on term and thus became relegated to a mere privilege.³⁸ Article 2102 of the *Code Napoléon* further confined this limitation on the exercise of the right of revendication to a period described as "*la huitaine*," which was understood to be approximately one week running from the time of delivery. The same article also provides expressly that the vendor's privilege is equally available whether the seller sold with or without a term.³⁹ To the redactors of the *Code Napoléon*, there was a very compelling reason to provide for a vendor's privilege in both kinds of sale: in contrast to both Roman law and ancient French law, the sales articles of the *Code Napoléon* force the transfer of ownership once agreement is reached upon the thing and the price, regardless of whether the sale was made on credit, and a privilege is therefore necessary to protect the unpaid vendor.⁴⁰

Essentially these same concepts have appeared in all three of Louisiana's Civil Codes. Presently, the vendor's privilege on movables is established by article 3227 of the Civil Code,⁴¹ immediately followed by three articles providing for the right of

later extended this privilege to credit sales. More time was required before the privilege was recognized in those areas where the traditions of Roman law were in vigor. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 485.

38. See FERRIÈRE, *supra* note 30, at 373 (explaining that, if the seller allowed additional time, such as seven or eight days or more, to pass before exercising his right of revendication, then, depending on the circumstances and the prudence of the judge, he was presumed to have tacitly trusted the buyer and had only the rights of a vendor on term).

39. After recent revisions to the French Civil Code, these rules are now found in article 2332. See CODE CIVIL [C. CIV.] art. 2332 (Fr.).

40. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 486. It has been asserted that the difference between protection granted to the unpaid seller under Roman law and the privilege afforded to him by the *Code Napoléon* is really a matter of form or technique in expressing the same idea: both systems provide the seller a real right and a right of preference until payment of the price. See BEUDANT ET AL., *supra* note 18, § 508.

41. The vendor's privilege on movables is also provided for under Louisiana Civil Code article 3217(7).

revendication, which is called the right of *restitution* rather than revendication.⁴² It is little known that this right of restitution, which is a vestige of the old Roman rule of revendication, has been preserved in the Civil Code. These three articles permit the seller of a movable not sold on credit to reclaim the movable as long as it is still in the possession of the purchaser, provided that the claim for restitution is made within eight days, the translation given to the term of “*la huitaine*,” and the identity of the movable has not been lost.⁴³ Nevertheless, this appears to be a seldom-used remedy indeed, as these articles have not been applied or interpreted in any reported Louisiana case since 1881.⁴⁴ As will be discussed below,

42. See LA. CIV. CODE arts. 3229–3231 (1870). The French versions of the 1825 Code and the Digest of 1808, borrowing from the *Code Napoléon*, used the word *revendication*, which was translated into English as *restitution*. It should be understood that this action in revendication, or restitution, is *not* founded on a claim of ownership and is wholly different from the revendicatory action available to the dispossessed owner of a movable under Louisiana Civil Code article 526. See XIII THÉOPHILE HUC, COMMENTAIRE THÉORIQUE ET PRATIQUE DU CODE CIVIL No. 100 (1900) (describing this view as the prevailing view). One French treatise explains that the French analogues to Louisiana Civil Code articles 3229 through 3231 do not use the term *revendicate* in a technical sense because, if they did, it would be essential that the seller retain the right of ownership in order to assert the action. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 523. The seller’s right of revendication under these articles has been explained as a *sui generis* form of revendication having nothing in common with the ordinary right of revendication available to an owner. See BEUDANT ET AL., *supra* note 18, § 520. *But see* HUC, *supra*, No. 103 (asserting that the legislator used the word *revendication* because he intended a resolution of the sale of right). The Louisiana Civil Code avoids this confusion by using the term *restitution* rather than *revendicate* in Louisiana Civil Code articles 3229 through 3231.

43. LA. CIV. CODE art. 3229 (2015). As French writers explain, the text of the corresponding article of the *Code Napoléon* imposes four conditions on the right of revendication: (i) that the sale be made without a term, (ii) that the thing still be in the possession of the buyer, (iii) that the revendication be claimed within eight days from delivery, and (iv) that the thing sold still be in the same condition in which delivery was made. The first and fourth of these conditions existed under the customary law, but the other two were added by the *Code Napoléon*. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 522; BEUDANT ET AL., *supra* note 18, § 518; HUC, *supra* note 42, No. 104.

44. The last reported case to interpret these articles was *Florsheim Bros. v. Howell*, 33 La. Ann. 1184 (1881), in which the Court held that the seller of cotton had lost both his vendor’s privilege and his right of restitution, even though he had filed suit to enforce his rights within only two days after delivering the cotton to the buyer, because the buyer had surrendered possession to a cotton factory. The cotton in *Florsheim* was sold in Shreveport. In response to a previous holding of the Court in *Campbell v. Penn*, 7 La. Ann. 371 (1852), the Civil Code had been amended in 1854 to provide a five-day right of pursuit in favor of the vendor of agricultural products in the City of New Orleans. See *S. Gumbel & Co. v. Beer*, 36 La. Ann. 484 (1884). Act 63 of 1890 enacted special

the reason that the right of restitution is provided for immediately after the article that establishes the vendor's privilege on movables is that the right of restitution is designed to afford the unpaid seller a means of protecting his privilege against the risk of a second sale that would cause a loss of the privilege.

But, what of the birth of the vendor's privilege on immovables? Though it shares the same lineage, it was born later. Just as was the case with the sale of a movable, a privilege in favor of the vendor of an immovable did not exist under Roman law.⁴⁵ The vendor of an immovable without a term continued to be viewed as owner and protected by the Roman rule of revendication.⁴⁶ The 16th-century text of the *Coutume de Paris* did not provide for a privilege in favor of the vendor of an immovable on term. Accordingly, the courts of Paris, in the early 17th century, held that the vendor of an immovable on term had no privilege and was protected only by the tacit general mortgage that the law then attributed to sales made in notarial form.⁴⁷ Thus, it was necessary for the vendor's protection that the vendor on term stipulate a special mortgage, and this usage became so general that, in two judgments of the *Parlement* of Paris in 1628, it was held that the vendor of an immovable on term enjoyed a special mortgage and privilege on the immovable securing the payment of the price, even without having obtained a conventional mortgage.⁴⁸ The vendor of an immovable became viewed as having a tacit privileged mortgage that

legislation, now Louisiana Revised Statutes section 9:4541, extending the application of this rule to any chartered city or town of this state. Act No. 63, 1890 La. Acts 51. This statute provides that the vendor's privilege has precedence over any "warehouse privilege or claim for warehouse charges, or any privilege or claim by the holder of a warehouse receipt." LA. REV. STAT. ANN. § 9:4541 (2007). In *John M. Parker Co. v. E. Martin & Co.*, 88 So. 68 (La. 1920), the Court held that the Uniform Warehouse Receipts Act impliedly repealed this provision insofar as negotiable warehouse receipts are concerned. Section 9:4541 mentions only a privilege and not the seller's right of restitution. See LA. REV. STAT. ANN. § 9:4541 (2007).

45. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 564.

46. *Id.*

47. PLANIOL & RIPERT, *supra* note 10, No. 2889. The usage of stipulating a mortgage in all acts creating obligations led the ancient customary law of France to find an implied general mortgage in all such acts executed under seal. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, at xx–xxi. See also M. BUGNET, 1 OEUUVRES DE POTHIER, COUTUME D'ORLÉANS, DE L'HYPOTHÈQUE, No. 6, at 639 (2d ed. 1861). This custom of implying a general mortgage even in the absence of a formal stipulation was continued under legislation known as the law of 9 *messidor* An III, enacted during the French Revolution. BAUDRY-LACANTINERIE ET AL., *supra* note 26, at xxviii.

48. PLANIOL & RIPERT, *supra* note 10, No. 2889.

was analogous to the privilege that the seller of a movable already enjoyed.⁴⁹

Legislation adopted during the French Revolution, known as the law of 11 *brumaire An VII*, confirmed the privilege of the vendor under the name of the "right of the preceding owner."⁵⁰ Shortly afterward, article 2301 of the *Code Napoléon* specifically provided for a privilege for the price in favor of the seller of immovables and movables alike.⁵¹ In Louisiana, the Digest of 1808 was even more explicit,⁵² providing that the privilege existed whether the estate was sold for ready money or on credit and regardless of whether a mortgage was expressly stipulated.⁵³

Thus, it can be seen that both of the vendor's privileges were born out of the constancy of usage, but of different usages. For movables, the repeated usage was the practice of delivering a movable under a precarious title in order to place the vendor in the same position as if he had made a sale without term. In the case of immovables, the repeated usage was the stipulation of a special mortgage in favor of the vendor, a practice leading to the recognition of a tacit privileged mortgage.⁵⁴

III. THE POLICY BEHIND VENDOR'S PRIVILEGES

In *De L'Isle v. Succession of Moss*,⁵⁵ the Court succinctly stated the policy reasons for the vendor's privilege:

It would indeed be unjust to place an unpaid vendor on a footing of equality with the other creditors of the purchaser, and permit these to devour his substance It would be iniquitous to permit the property sold to become the prey of the creditors of the purchaser, without requiring, as condition precedent, the payment of its costs.⁵⁶

49. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 565.

50. *Id.* Other reforms effectuated by the law of 11 *brumaire An VII* were to eliminate all conventional general mortgages and to make impossible the creation of mortgages for indefinite sums. See PLANIOL & RIPERT, *supra* note 10, Nos. 2680–2686; BAUDRY-LACANTINERIE ET AL., *supra* note 26, at xxxii.

51. See CODE CIVIL [C. CIV.] art. 2374 (Fr.).

52. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS art. 475 (de la Vergne ed. 1968) (1808) [hereinafter LA. DIGEST of 1808].

53. In the 1825 Louisiana Civil Code, as well as the 1870 Code, the latter proviso was omitted.

54. See discussion *supra*.

55. 34 La. Ann. 164 (1882).

56. *Id.* at 166–67.

French writers gave essentially the same justification but in language that evokes other concepts of the Civil Code: The unpaid vendor has gratuitously augmented the *common pledge* of the vendee's creditors, who are thus *unjustly enriched* at the vendor's expense.⁵⁷ Because the sales articles of the French Civil Code⁵⁸—and of course the Louisiana Civil Code as well⁵⁹—force the immediate transfer of title to the vendee even though the price has not been paid, the privilege is necessary to prevent an inequity.⁶⁰ The vendor is privileged because he has augmented the patrimony of the vendee.⁶¹

There is another policy reason for the vendor's privilege based upon the justification that exists generally for most privileges: The existence of the privilege benefits the debtor by allowing him to obtain credit that would otherwise not be available to him.⁶² In the specific case of the vendor's privilege, its existence facilitates sales that otherwise would simply not occur. For without a privilege, the seller either would refuse to sell on credit or would insist upon other security.⁶³ This policy justification was invoked by the Supreme Court in *W. T. Grant Co. v. Mitchell*,⁶⁴ in holding that the exemptions from seizure allowed by law⁶⁵ cannot be asserted against a provisional seizure by writ of sequestration to preserve a vendor's privilege on a movable⁶⁶:

The law of vendor's privilege in this state operates to favor the vendor and the vendee alike. The long history of vendor's

57. PLANIOL & RIPERT, *supra* note 10, No. 2608. See also BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 567.

58. CODE CIVIL [C. CIV.] art. 1583 (Fr.).

59. LA. CIV. CODE art. 2456 (2015).

60. See also BAUDRY-LACANTINERIE ET AL., *supra* note 26, Nos. 483, 486.

61. PLANIOL & RIPERT, *supra* note 10, Nos. 2608–2609.

62. See VETTER & HARRELL, *supra* note 14, at 283.

63. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 484.

64. 269 So. 2d 186 (La. 1972).

65. See LA. REV. STAT. ANN. § 13:3881 (Supp. 2015).

66. Justice Tate dissented, pointing out the incongruity in the majority's interpretation that a debtor cannot claim the exemption from a temporary seizure but he may do so to prevent the sale of the exempted property under a writ of *fieri facias* issued in execution of the judgment in favor of the seizing creditor. Justice Tate believed that the case should have been controlled by *Young v. Geter*, 170 So. 240 (La. 1936), which held that a lessor's privilege could not be asserted against property exempted by the predecessor provision to Louisiana Revised Statutes section 13:3881. If *W. T. Grant* truly stands for the proposition that a vendor can sequester goods that he cannot expose to an execution sale in the enforcement of his privilege, the practical effect of the decision would seem to be to permit the vendor to exercise, through sequestration, what is tantamount to a right of restitution, even when the conditions of Louisiana Civil Code article 3229 are not satisfied.

privilege in Louisiana demonstrates that it enables the purchaser to acquire property he may otherwise be unable to buy as much as it induces the vendor to sell. Without the benefits accorded the vendor, it may well be concluded that in a substantial number of instances the possession and title to property would not be surrendered to prospective purchasers. Because of it, many impecunious citizens are enabled to acquire property to foster their livelihood and provide for their sustenance.⁶⁷

The justification underpinning the priority that the law affords to a vendor's privilege is the principle that no one can grant a greater right than what he himself holds. On this point, Planiol cites Pothier:

As Pothier explains, the reason that he who has sold the heritage should be preferred to all the other creditors is that the owner has acquired the heritage only with the charge of the mortgage which his vendor has reserved on it in alienating it. The purchaser cannot mortgage it to his other creditors except subject to the charge of this mortgage, because he cannot transfer to them a greater right than he had on it himself.⁶⁸

IV. NATURE OF VENDOR'S PRIVILEGES

The vendor's privilege gives the seller the right to be satisfied from the proceeds of the thing sold with preference over other creditors of the buyer.⁶⁹ It attaches automatically to anything that is sold—movable or immovable, corporeal or incorporeal.⁷⁰ It is a

67. *W.T. Grant Co.*, 269 So. 2d at 191. The Court also rejected the purchaser's constitutional due process arguments, finding that the purchaser holds possession with the "implied-in-law" knowledge that he has acquired the right to possession subject to the vendor's paramount right to seize the property without hearing upon a default in payment. *Id.* at 191. The Court's holding on the constitutional due process claim was affirmed by the United States Supreme Court. *See Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

68. *See* PLANIOL & RIPERT, *supra* note 10, No. 3140.

69. BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 483.

70. *Id.* No. 489. *See also* PLANIOL & RIPERT, *supra* note 10, No. 2610 (explaining that the vendor's privilege extends even to the sale of a credit); BEUDANT ET AL., *supra* note 18, § 513; HUC, *supra* note 42, No. 90. Louisiana's revision of Chapter 9 of the Uniform Commercial Code in 2001, which brought the outright sale of many types of credits within its scope, included a non-uniform provision designed to preserve vendor's privileges arising from the sale of accounts, chattel paper, payment intangibles, and promissory notes. Where the language of the model act provides that the seller of property of that nature

matter of substantive right incident to a contract of sale and not a mere remedy for enforcing its execution.⁷¹ Because a vendor's privilege arises by operation of law, the concurrence of both spouses is not required to establish it, even if it encumbers community immovables.⁷² A vendor's privilege will arise only from a sale, and not from other kinds of transactions, such as a building contract.⁷³ Thus, there must be a transfer of ownership for a price.⁷⁴ A vendor's

does not retain a legal or equitable interest in the property sold, the non-uniform Louisiana provision instead provides that the seller does not retain an ownership interest. LA. REV. STAT. ANN. § 10:9-318(a) (2002). Louisiana Official Revision Comment (a) to this section explains that the reason for the Louisiana variation was to be consistent with Louisiana law under which the seller of a thing acquires a vendor's privilege by operation of law.

71. See, e.g., *Willey v. St. Charles Hotel Co.*, 28 So. 182 (La. 1899); *Deal v. Lexing-Powell*, 824 So. 2d 541 (La. Ct. App. 2002). This rule was also cited in *Sears, Roebuck & Co. v. Fontaine*, 539 So. 2d 986 (La. Ct. App. 1989), in which the court held that the plaintiff, which sold furniture to the defendant on credit, was entitled as a matter of law to a vendor's privilege and had therefore stated a cause of action. An interesting defense that was mentioned, though not resolved, in the opinion was that no vendor's privilege arose because the defendant had paid by credit card. *Id.* at 987.

72. See LA. CIV. CODE art. 2347 cmt. a (2015) (stating that encumbrances such as a vendor's privilege imposed by law are not subject to the requirement of concurrence by the spouses, cited approvingly in *Magee v. Amiss*, 502 So. 2d 568, 570 (La. 1987)). Nevertheless, *Magee* held that a non-concurring spouse is entitled to notice of the foreclosure sale of former community property under *Menonite Board of Missions v. Adams*, 462 U.S. 791 (1983). *Magee*, 502 So. 2d at 572.

73. See *Long Leaf Lumber, Inc. v. Summer Grove Developers, Inc.*, 270 So. 2d 588, 591 (La. Ct. App. 1972) (holding that no vendor's privilege existed in favor of a company that had contracted to install heating and air conditioning units in a building, since there was no contract of sale and no vendor-vendee relationship existed between the company and the owner). Of course, the company would be entitled to a privilege on the entire immovable under the Private Works Act. See LA. REV. STAT. ANN. § 9:4801 (2007); *Long Leaf*, 270 So. 2d at 591-92. For a discussion of the difference between a sale and a building contract, see DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES § 1:10, in 24 LOUISIANA CIVIL LAW TREATISE 23 (2012).

74. See TOOLEY-KNOBLETT & GRUNING, *supra* note 73, § 1:9; BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 487. Thus, the contribution of an immovable to a partnership without stipulation of a price other than the allocation to the transferor of shares in the partnership does not give rise to a privilege. BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 575. A donor has no privilege even if pecuniary obligations are imposed on the donee. AUBRY ET RAU, *supra* note 20, § 263. *But see* HUC, *supra* note 42, No. 109 (arguing that it is arbitrary to grant the privilege in the case of contracts of sale but not in other contracts that augment the debtor's patrimony). For a case in which a buyer curiously but unsuccessfully asserted entitlement to a vendor's privilege, see *In re Bulk Sales Agreement*, 365 So. 2d 547 (La. Ct. App. 1978), holding that a

privilege does not arise from a loan transaction by which the purchaser borrows the money to be used to purchase the property.⁷⁵

The vendor's privilege is accessory to the obligation that it secures and thus transfers automatically with the transfer of the instrument evidencing the price, without the need for a special stipulation to that effect.⁷⁶ Accordingly, even though a loan transaction does not itself give rise to a vendor's privilege, it is

buyer of goods who made advance payments in an amount greater than the price of the goods ultimately purchased was not entitled to a vendor's privilege.

75. See, e.g., *Johnson v. Turner*, 218 So. 2d 363, 365 (La. Ct. App. 1969) (holding that a creditor who lent a purchaser the funds with which to purchase property had no vendor's privilege on the property purchased). By contrast, the Uniform Commercial Code grants purchase money security interest status not only to a consensual security interest in favor of the actual seller but also to a security interest held by a secured party that lent the purchaser the money with which to make the purchase. LA. REV. STAT. ANN. § 10:9-103 (Supp. 2015). House Bill 266 of 2011, if passed by the Louisiana Legislature, would have amended Louisiana Civil Code article 3307 to provide that "when the proceeds of a mortgage are used by the mortgagor to purchase immovable property, the mortgagee shall have the same ranking as a vendor in accordance with the rules set forth in Article 3251." H.B. 266, 2011 Leg., Reg. Sess. (La. 2011). Though this bill did not proceed beyond assignment to committee, it spawned a resolution requesting the Louisiana State Law Institute to study the advisability of creating a purchase money special mortgage. H. Con. Res. 15, 2011 Leg., Reg. Sess. (La. 2011). After a comprehensive study, the Law Institute recommended against adoption in Louisiana of the concept of a purchase money mortgage with special priority. See Louisiana State Law Institute, Report of the Louisiana State Law Institute to the Louisiana Legislature in Response to HCR No. 15 of 2011 (Nov. 12, 2014) (regarding purchase money mortgage) (on file with the Louisiana State Law Institute). The French Civil Code now grants to the lender of funds for the acquisition of an immovable a privilege upon the immovable, even in the absence of subrogation from the vendor, but only if it is provided in an authentic act that the funds were borrowed for this purpose and the vendor acknowledges in an authentic act that he has been paid from the borrowed funds. CODE CIVIL [C. CIV.] art. 2374(2) (Fr.). The reason for the requirement of authentic declarations concerning the use of the borrowed funds is to prevent a debtor from favoring one creditor to the prejudice of others by a false claim that the loan proceeds were used to acquire the immovable. See PHILIPPE SIMLER & PHILIPPE DELEBECQUE, DROIT CIVIL: LES SURETES LA PUBLICITE FONCIERE § 419 (6th ed. 2012); JEAN-LOUIS BERGEL, LA VENTE D'IMMEUBLES EXISTANTS No. 297, at 203 (1983); AUBRY ET RAU, *supra* note 20, § 263; HUC, *supra* note 42, No. 114.

76. See A.N. YIANNPOULOS, PROPERTY § 232, in 2 LOUISIANA CIVIL LAW TREATISE (4th ed. 2014); see also *Perot v. Levasseur*, 21 La. Ann. 529, 530 (1869); see generally LA. CIV. CODE arts. 2645, 3136 (2015); LA. REV. STAT. ANN. § 10:9-203(f) (Supp. 2015). But see *First Fed. Sav. & Loan Ass'n of Warner Robins, Ga. v. Delta Towers, Ltd.*, 544 So. 2d 1331, 1343 (La. Ct. App. 1989) (making the rather astonishing statement that a vendor's privilege is not an accessory obligation).

possible for a creditor who finances the purchase price to acquire a vendor's privilege through the simple expedient of having the seller sell the property on credit, thus creating a vendor's privilege, and then assign to the creditor the instrument evidencing the buyer's obligation to pay the price. The vendor's privilege, as an accessory, is transferred with the assignment of the instrument. For many years, institutional lenders in Louisiana followed this very practice in order to gain the benefit of a vendor's privilege.

In the case of movables, the vendor's privilege affords the seller automatic security in the form of a right to be preferred over other creditors of the buyer. Historically, the only other security device available to the seller was the pledge,⁷⁷ but a pledge could be created only if the seller retained possession.⁷⁸ In a time before recognition of chattel mortgages⁷⁹ and certainly before security interests under the Uniform Commercial Code,⁸⁰ the vendor's privilege allowed the seller to deliver possession and yet retain security. This same benefit still exists today, regardless of whether the seller for some reason failed to arrange for the buyer on credit

77. For a comprehensive history of the development of mortgages and an explanation of the reasons why France did not retain the Roman rule permitting movables to be encumbered by mortgage, see DAGGETT, *supra* note 32, § 4. See also BEUDANT ET AL., *supra* note 18, § 326.

78. Under article 3152 of the Louisiana Civil Code of 1870, delivery of the thing pledged was essential to the very existence of the contract of pledge, even between the parties. See also LA. CIV. CODE art. 3149 (2015) (requiring "the thing pledged . . . [to be] delivered to the pledgee or a third person who has agreed to hold the thing for the benefit of the pledgee" to create an effective pledge of a corporeal movable").

79. Chattel mortgages were not recognized in Louisiana until the enactment of the first chattel mortgage law, Act 65 of 1912, which allowed a debtor to grant security in corporeal movable property without the necessity of placing the creditor into physical possession. See Act No. 65, 1912 La. Acts 75. The impetus for the adoption of the chattel mortgage law came from Judge David B. Samuel, who had practiced law in Arkansas, where chattel mortgages were then extensively used. See DAGGETT, *supra* note 32, § 6. Wisely, however, there was no attempt to import Arkansas notions of chattel mortgage; instead, the chattel mortgage was fashioned upon the model of the civilian mortgage upon immovables. *Id.* Because of political opposition to an exemption provision contained in the act, Governor Luther T. Hall refused to sign it, instead allowing it to become law without his signature. *Id.*

80. Louisiana was the last state to adopt Article 9 of the Uniform Commercial Code. See Act No. 528, 1988 La. Acts 1367, amended by Act No. 135, 1989 La. Acts 417 (adopting "Chapter 9 of the Louisiana Commercial Laws" effective January 1, 1990). With the enactment of Act No. 128, 2001 La. Acts 561, Louisiana finally embraced the title "Uniform Commercial Code" in place of "Commercial Laws," which a quarter century earlier had been considered to be a more apt description of a set of laws that were derided as being neither uniform nor worthy of the term "code." See LA. REV. STAT. ANN. §10:1-101 cmts. (2003 & Supp. 2011).

to grant him a consensual security interest.⁸¹ However, the sale must be a Louisiana sale; otherwise, no vendor's privilege arises under Louisiana law.⁸²

For immovables, the privilege affords even greater rights and is much stronger. As discussed below, the vendor's privilege on immovables is unquestionably a real right, giving the vendor who has properly recorded the act of credit sale the right to assert his privilege even after the immovable has passed into the hands of a third person. The vendor's privilege exempts the seller from having to bear the general privileges as mere mortgagees are forced to do.⁸³ More importantly, timely recordation of the vendor's privilege causes it to outrank even previously existing mortgages against the vendee.⁸⁴ This includes not only mortgages that may be recorded within the period of time prescribed for recordation of the privilege but also pre-existing mortgages bearing against the vendee's property.⁸⁵

81. *See, e.g.*, *Johnson v. Midland Ins. Co.*, 541 So. 2d 1010, 1012 (La. Ct. App. 1989) (holding that the failure of the seller of an item of farm equipment to obtain a chattel mortgage did not deprive him of his vendor's privilege and he therefore retained an insurable interest in the equipment).

82. *See* *McIlvaine v. Legaré*, 34 La. Ann. 923, 926 (1882); *Fred E. Cooper, Inc. v. Farr*, 165 So. 2d 605 (La. Ct. App. 1964); *see also* MICHAEL H. RUBIN, *LOUISIANA LAW OF SECURITY DEVICES: A PRÉCIS* § 31.1 (LexisNexis 2011); *cf.* *De La Vergne Refrigerating Mach. Co. v. New Orleans & W.R. Co.*, 26 So. 455 (La. 1899) (holding that, where a contract of sale made in New York contemplated delivery and testing of the movables in Louisiana, and the buyer's acceptance was dependent on the results of the test and the movables remained the property of the seller and at its risk until thus tested and accepted, the contract was a Louisiana sale creating a vendor's privilege). *But see* *Jones v. Bradford*, 353 So. 2d 1348, 1352 (La. Ct. App. 1977) (appearing to assume, without discussion, that a vendor's privilege arose from the sale of equipment in Mississippi and holding that the privilege continued to be effective after the equipment was subsequently removed to Louisiana without the seller's consent). Under a modern conflicts of law analysis, the inquiry should focus upon whether Louisiana substantive law is applicable to the sale, rather than merely the situs of the thing sold or the parties. *See generally* TOOLEY-KNOBLETT & GRUNING, *supra* note 73, §§ 1:11–18.

83. LA. CIV. CODE art. 3267 (2015).

84. *See* LA. CIV. CODE arts. 3186, 3274 (2015).

85. Until recently, there was another significant advantage of a vendor's privilege as compared to a mere conventional mortgage: Under former Louisiana Revised Statutes section 47:2183, vendor's privileges, unlike conventional and judicial mortgages, were not divested by the expiration of the three-year redemptive period following a tax sale. *Conservative Homestead Ass'n v. Flynn*, 150 So. 564 (La. 1933); *Whitfield v. Jones*, 270 So. 2d 153 (La. Ct. App. 1972). However, the 2009 revision of the law of tax sales removed this advantage. *See* LA. REV. STAT. ANN § 47:2121(C) (2009) (enacted by Act No. 819, 2009 La. Acts 3105). *See also* PETER S. TITLE, *LOUISIANA REAL ESTATE TRANSACTIONS* § 17:37 (2d ed. 2014). The holder of a vendor's privilege is

The vendor's privilege secures not only the price itself but also interest accruing on the price,⁸⁶ attorneys' fees stipulated in the obligation representing the purchase price,⁸⁷ and any other monetary obligation of the purchaser undertaken in the sale transaction.⁸⁸ In one relatively recent case, the Supreme Court held that a vendor's privilege even secured the purchaser's obligation to pay the seller an additional amount of money in the event that a reversionary clause in the act of sale was found to be unenforceable.⁸⁹ It has also been held that a buyer's agreement to reimburse the seller for the amount needed to clear encumbrances on property that the buyer "traded in" was an integral part of the purchase price secured by the vendor's privilege, rather than an obligation separate and distinct from the sale.⁹⁰ If several things are sold at the same time with an allocation of the purchase price among them, the vendor's privilege on each thing sold secures only the portion of the price allocated to that thing.⁹¹

nonetheless entitled to notice of the tax sale, and without notice to him the tax sale is absolutely null. *Padilla v. Schwartz*, 11 So. 3d 6, 14 (La. Ct. App. 2009).

86. *Caldwell v. His Creditors*, 9 La. 265, 267-68 (1836). See also *BAUDRY-LACANTINERIE ET AL.*, *supra* note 26, No. 490.

87. *Hibernia Bank & Trust Co. v. McCall Bros. Planting & Mfg. Co.*, 73 So. 857, 858 (La. 1917).

88. *VETTER & HARRELL*, *supra* note 14, at 155; *HUC*, *supra* note 42, No. 112.

89. *Lessard v. Lessard Acres, Inc.*, 349 So. 2d 293 (La. 1977). The Court cited *Hibernia Bank & Trust Co. v. McCall Bros. Planting & Manufacturing Co.*, 73 So. 857 (La. 1917), for the proposition that a vendor's privilege secures payment of attorney's fees stipulated in the promissory note even though that is only a conditional obligation and found that the same principle applied to the conditional obligation of the purchaser in *Lessard* to pay the seller an additional sum in the event the reversionary clause was unenforceable. *Lessard*, 349 So. 2d at 297. According to the majority opinion, there is no reason why the seller and purchaser could not agree that the price would include an additional amount if the purchaser failed to comply with obligations imposed upon him. *Id.* Justice Tate dissented, believing that the stipulated payment was merely a penalty in lieu of the reversion of the property to the seller and, not being part of the purchase price, was not secured by the vendor's privilege. *Id.* at 299. See *BAUDRY-LACANTINERIE ET AL.*, *supra* note 26, No. 490; *AUBRY ET RAU*, *supra* note 20, § 263; *HUC*, *supra* note 42, No. 91 (expressing the view that the vendor's privilege does not include damages that are awarded by the courts or that are due under a clause for stipulated damages).

90. *Scott v. Reed*, 524 So. 2d 756, 759 (La. Ct. App. 1988).

91. See *HUC*, *supra* note 42, No. 91. For a modern case applying this rule, see *Ford v. J & J Pallets, Inc.*, 623 So. 2d 91 (La. Ct. App. 1993) (where a sale contract executed in connection with the sale of a business allocated the total purchase price between inventory and other assets and provided that the purchase price for the inventory would be payable over time, the court held that the vendor's privilege attached only to the inventory). The court distinguished

A sale and resale of a thing made for the sole purpose of acquiring a vendor's privilege on the object is recognized under the law. For instance, it is lawful for the parties to an out-of-state sale to enter into another sale-resale in Louisiana for the purpose of creating a vendor's privilege.⁹² As is well known, building and loan associations for decades used the sale-resale transaction for the express purpose of creating a vendor's privilege in the association's favor—a practice that is discussed in detail below.

As the cases cited in the introduction to this Article illustrate, the assumption of a debt due to one of the vendor's creditors—such as a mortgagee—creates a vendor's privilege in favor of that creditor on the thing sold.⁹³ It has been held that, if the vendee assumes a debt secured by an outstanding mortgage that burdens only a portion of the estate sold to the vendee, the vendor's privilege thus created in favor of the mortgagee nonetheless burdens the entire estate.⁹⁴

De La Vergne Refrigerating Machine Co. v. New Orleans & W.R. Co., 26 So. 455 (La. 1899), in which the parties made no allocation of the purchase price between two items of equipment sold. *Ford*, 623 So. 2d at 94.

92. *Pratt Eng'g & Mach. Co. v. Cecelia Sugar Co.*, 65 So. 100 (La. 1914); *Edward J. Gay & Co. v. Crichlow & Donelson*, 29 La. Ann. 122, 123 (1877).

93. *De L'Isle v. Succession of Moss*, 34 La. Ann. 164 (1882); *Conté v. Cain*, 33 La. Ann. 965 (1881); *Franklin Press, Inc. v. Nat'l Diversified Corp.*, 286 So. 2d 469, 472 (La. Ct. App. 1974).

94. *Citizens' Bank of La. v. Succession of Cuny*, 38 La. Ann. 360 (1886). Louisiana Revised Statutes section 9:5383 appears to intend to alter this result, though the statute is awkwardly worded and written in a way that seems not to recognize that the assumption itself creates a new vendor's privilege:

In a transfer of more than one parcel of immovable property, no assumption in globo is created by the assumption by a purchaser of more than one vendor's privilege and/or mortgage, unless the contrary is expressed in said transfer. In such cases, whenever separate parcels of immovable property are transferred to a purchaser who expressly assumes the payment of the vendor's privileges and/or mortgages bearing against the immovable property purchased, each vendor's privilege and/or mortgage shall be deemed to have each been assumed separately and distinctly as if only one parcel of immovable property had been transferred, and each such vendor's privilege and/or mortgage shall continue to affect and bear against only the specific immovable property described in the instrument by which the vendor's privilege and/or mortgage was originally created. Likewise, unless the contrary is expressed in said transfer, any resolatory condition or right to rescind arising in favor of the vendor as a result of the failure to pay any of the vendor's privileges and/or mortgages shall be deemed to apply only to the immovable property affected by its respective vendor's privilege and/or mortgage.

See LA. REV. STAT. ANN. § 9:5383 (2007); VETTER & HARRELL, *supra* note 14, at 162 (explaining that this statute was “apparently intended to create a presumption that the vendor's privilege on each piece of property is limited to

As will be explored in considerable depth below in the discussion of whether vendor's privileges constitute real rights, the vendor's privilege on a movable is lost when the vendee sells and delivers the thing to a second buyer. Because the vendor does not have a general privilege on the property of the vendee, the vendor does not have a privilege on the cash price received by the vendee from the sale of the movable subject to the vendor's privilege, even though that sale causes the loss of his privilege.⁹⁵ However, if the second sale is made on credit, the original vendor's privilege nonetheless continues to encumber the unpaid price owed by the second buyer.⁹⁶ The vendor's privilege similarly continues to exist upon proceeds of the sale of the thing by a receiver and proceeds of the judicial sale of a thing while the proceeds are still in the hands of the court.⁹⁷ By special statute, the holder of a vendor's privilege on movable property destroyed by fire has a privilege, with the rank of a vendor's privilege, on the claim for money due to the vendee under insurance policies covering the property.⁹⁸

As a procedural matter, the assertion of a vendor's privilege enables seizure of the property by sequestration before judgment.⁹⁹ Enforcement of the vendor's privilege is subject to the Deficiency Judgment Act,¹⁰⁰ and the creditor's extrajudicial sale of the property subject to a vendor's privilege, or a judicial sale without appraisal, will thus cause a loss of the creditor's deficiency rights.¹⁰¹

that part of the indebtedness that was assumed which is secured by a pre-existing mortgage or privilege on that property, unless the parties provide to the contrary").

95. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 496; YIANNOPOULOS, *supra* note 76, § 232.

96. S.O. Nelson & Co. v. John C. Simpson-Hill, McLean & Co., 9 La. Ann. 311, 313 (1854). For a discussion of the reasons why the privilege attaches to the unpaid price owed by the second buyer, see BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 497, and BEUDANT ET AL., *supra* note 18, § 511. *But see* HUC, *supra* note 42, No. 92 (questioning the soundness of this rule).

97. Millaudon v. New-Orleans Water Co., 11 Mart. (o.s.) 278, 279 (La. 1822); Terry v. Terry, 10 La. 68 (1836). *See also* YIANNOPOULOS, *supra* note 76, § 232; HUC, *supra* note 42, No. 91.

98. LA. REV. STAT. ANN. § 9:4581 (2007). This principle is in accord with French doctrine. *See* AUBRY ET RAU, *supra* note 20, § 263; BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 499 (noting the insurance proceeds being assimilated to the price produced by the sale).

99. *See* W. T. Grant Co. v. Mitchell, 269 So. 2d 186 (La. 1972); *see also* LA. CODE CIV. PROC. art. 3571 (2015).

100. LA. REV. STAT. ANN. § 13:4106 (2006).

101. *See* Cormier v. Castille, 488 So. 2d 247, 248 (La. Ct. App. 1986); Justice v. Caballero, 393 So. 2d 866, 869 (La. Ct. App. 1981). In contrast,

In an apparent attempt to strengthen the protections afforded by vendor's privileges on immovables, the legislation that adopted a non-uniform version of Chapter 9 of the Uniform Commercial Code, effective January 1, 1990,¹⁰² also enacted Louisiana Revised Statutes sections 9:5550 through 9:5554, which somewhat surprisingly pair vendor's privileges with collateral mortgages.¹⁰³ The definition given to the term "vendor's privilege" in Louisiana Revised Statutes section 9:5550(2),¹⁰⁴ which contemplates that a vendor's privilege might secure a collateral mortgage note, reflects a misunderstanding of the fundamental nature of a vendor's privilege, which can arise only by operation of law and therefore could never secure a collateral mortgage note. Section 5554 provides, in the case of both collateral mortgages and vendor's privileges, that there is no requirement of registry of the pledge, transfer or assignment of, or the granting of a security interest in, the obligation secured by either.¹⁰⁵ Section 5553 in effect makes

enforcement of a security interest arising under the Uniform Commercial Code is exempt from the provisions of the Deficiency Judgment Act. *See* LA. REV. STAT. ANN. § 10:9-626(c) (Supp. 2015).

102. Act No. 135, 1989 La. Acts 417.

103. For a discussion of the nature and theory of a collateral mortgage, see *Diamond Services Corp. v. Benoit*, 780 So. 2d 367 (La. 2001), and *First Guaranty Bank v. Alford*, 366 So. 2d 1299 (La. 1978). *See also* Max Nathan, Jr., & H. Gayle Marshall, *The Collateral Mortgage*, 33 LA. L. REV. 497 (1973). A "collateral mortgage note" is defined in Chapter 9 of the Uniform Commercial Code, which, since 1990, has governed the granting of a security interest in a collateral mortgage note. *See* LA. REV. STAT. ANN. § 10:9-102(d)(3) (Supp. 2015). Apparently unaware of this change in the law in 1990, some courts appear to labor under the erroneous belief that the Civil Code articles governing pledge continue to apply to collateral mortgage notes. *See, e.g.*, *CadleRock Joint Ventures Co. v. J. Graves Scaffolding Co.*, 152 So. 3d 1079 (La. Ct. App. 2014); *Nine-O-Five Royal Apartment Hotel, Inc. v. Atkins*, 151 So. 3d 739 (La. Ct. App. 2014); *Gulf Nat., L.L.C. v. Alfortish, Inc.*, 926 So. 2d 676 (La. Ct. App. 2006); *see also* Michael H. Rubin, *Ruminations on Pledge*, 75 LA. L. REV. 697, 704 n.39 (2015); David S. Willenzik, *Louisiana Future Advance Mortgages: A 20-Year Retrospective*, 75 LA. L. REV. 613, 695 (2015).

104. "Vendor's privilege" shall mean a vendor's lien or vendor's privilege on immovable property that secures a written obligation, such as a collateral mortgage note, negotiable or nonnegotiable instrument, or other written evidence of debt." LA. REV. STAT. ANN. § 9:5550(2) (2007).

105. Although there may be no requirement of registry of the pledge, transfer or assignment, there is a consequence of failing to record the instrument. *See* LA. CIV. CODE art. 3356 (2015). What the statute may have intended is that there is no requirement of registry in order for executory process to be available to enforce a collateral mortgage or vendor's privilege. Act 135 of 1989 made substantial changes to the articles of the Code of Civil Procedure bearing upon the requirements for executory process. *See* Act No. 135, 1989 La. Acts 417.

certain defenses, other than the defense of forged signatures, personal to the original obligor and precludes other persons from raising them as a basis for extinguishment of a vendor's privilege if the original obligor does not do so. Included among these defenses are the invalidity or extinguishment of the underlying obligation and the lack of registry of the transfer, assignment, or pledge of the obligation secured by the vendor's privilege. As yet, only one case has applied this statute, holding that a third possessor may not assert prescription of an obligation secured by a vendor's privilege on an immovable when the original obligor has not raised this defense.¹⁰⁶

V. THE PRIVILEGE DISTINGUISHED FROM THE RIGHT OF DISSOLUTION

The vendor's privilege is, of course, but one arrow in the quiver of the seller, who also enjoys the right of dissolution of the sale in the event the vendee fails to pay the price.¹⁰⁷ The exercise

106. *Giddens v. Giddens*, 722 So. 2d 114 (La. Ct. App. 1998). The opinion might be criticized on both the ground that it treats the accrual of liberative prescription as an extinguishment of the prescribed obligation and the ground that it ignores Louisiana Civil Code article 3453, which specifically provides that persons having an interest "in the extinction of a claim or of a real right by prescription may plead prescription, even if the person in whose favor prescription has accrued renounces or fails to plead prescription." On the former ground, see Louisiana Civil Code article 3447, which provides that liberative prescription is a means of barring an action (rather than a means of extinction of an obligation), and Louisiana Civil Code article 3277, which lists both extinction of the debt secured by a privilege *and* prescription as separate causes for the extinction of a privilege. On the latter ground, see Louisiana Civil Code articles 3453 and 3447. *See also* LA. CIV. CODE art. 3277 (1870); AUBRY ET RAU, *supra* note 20, § 292 (asserting on the basis of the article of the French Civil Code analogous to Louisiana Civil Code article 3453, that a third possessor can plead prescription even if the debtor has renounced it).

107. LA. CIV. CODE arts. 2561–2653 (2015). Under the *Code Napoléon*, the unpaid seller of a movable is granted four different rights correlative to the buyer's obligation to pay the price: (i) the right of retention until payment is made; (ii) the vendor's privilege; (iii) the right of dissolution; and (iv) the right of revendication discussed above. *See* BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 482. The unpaid seller of an immovable enjoys only the first three of these, but his rights are nonetheless much stronger because his privilege entails a right of pursuit, obviating the need for the right of revendication accorded to the seller of a movable. *Id.* No. 566. In a credit sale of either a movable or an immovable, the seller is afforded only the vendor's privilege and right of dissolution. *See* BEUDANT ET AL., *supra* note 18, § 507. The Louisiana Civil Code recognizes all four of these rights, in addition to the remedy of stoppage in transit allowed to the seller of a movable under Louisiana Civil Code article 2614. That remedy was borrowed from Article 2 of the model Uniform Commercial Code, which has not been adopted in Louisiana.

of this right is, of course, antithetical to the vendor's privilege. With the exercise of the right of dissolution of the sale, the vendor undoes the sale and must return whatever portion of the price that has been paid.¹⁰⁸ Enforcement of the vendor's privilege, on the other hand, is an affirmation of the sale by which the vendor seeks to enforce the vendee's obligation to pay the price.¹⁰⁹ The right of a vendor to seek dissolution of a sale upon non-payment of the price and the vendor's privilege are distinct remedies, neither of which is dependent on the existence of the other.¹¹⁰ Thus, the Supreme Court has held that a provision in an act of sale to the effect that the vendee's obligation to pay the price would be a personal obligation and that no "lien" would exist in favor of the vendor does not waive the vendor's separate right of dissolution.¹¹¹ Another difference between the two alternative rights is recordation: Where immovables are concerned, the vendor's privilege must be evidenced by a recordation in the mortgage records.¹¹² On the other hand, the right of dissolution can be asserted against third persons¹¹³ without the necessity of recordation in the mortgage records, so long as the act conveying the immovable to the vendee does not reflect that the price was paid.¹¹⁴ The fact that the vendor has lost, or failed to

108. LA. CIV. CODE art. 2561 cmt. e (2015). *See also* Lee v. Taylor, 21 La. Ann. 514 (1869); Louis Werner Saw Mill Co. v. White, 17 So. 2d 264, 268 (La. 1944); *see generally* TOOLEY-KNOBLETT & GRUNING, *supra* note 73, §§ 15:9–22.

109. Robertson v. Buoni, 504 So. 2d 860, 862 (La. 1987).

110. *Id.* at 863; Johnson v. Bloodworth, 12 La. Ann. 699 (1857); Louis Werner Saw Mill Co. v. White, 17 So. 2d 264 (La. 1944). *See also* Shapiro v. Kimbrough, 20 So. 2d 24, 29 (La. Ct. App. 1944) (holding that a previous suit for judgment on the note secured by the vendor's privilege is not a bar, under a theory of either estoppel or res judicata, to a subsequent claim for dissolution). Shapiro v. Kimbrough cites Canal Bank v. Copeland, 15 La. 75 (1840), for the proposition that "a previous suit for the specific performance of a contract, far from being a bar to subsequent action for its rescission, is by our law considered as one of the preliminary steps to be resorted to." Shapiro, 20 So. 2d at 29.

111. Sliman v. McBee, 311 So. 2d 248, 252 (La. 1975) (holding that in order for the seller to waive his separate and independent right to dissolve the sale, he must express his intent to do so in words that make specific reference to the action to dissolve as distinguished from the action to enforce the contract).

112. LA. CIV. CODE arts. 3271, 3274 (2015). *See* discussion *infra* Part VI.

113. The right to dissolution of the sale of an immovable for non-payment of the price is not contingent on the absence of a third-party purchaser, and a vendor seeking dissolution of the sale may do so even after the property has left the hands of the original purchaser. *See Buoni*, 504 So. 2d 860.

114. *See, e.g.,* City Bank & Trust Co. v. Caneco Constr., Inc., 341 So. 2d 1331 (La. Ct. App. 1977) (holding that the seller was barred by both the parol evidence rule and the public records doctrine from seeking to enforce to the prejudice of a mortgagee either the seller's right to dissolve or its vendor's privilege, where the act of sale recited that the purchase price had been paid in

preserve, a vendor's privilege presents no obstacle to the exercise of the separate right of dissolution.¹¹⁵

Until the revision of the sales articles of the Civil Code in 1993, there was another interesting distinction between the vendor's privilege and the right of dissolution. Following prior jurisprudence, *Louis Werner Saw Mill Co. v. White*¹¹⁶ held that the action to dissolve a sale for the non-payment of the purchase price is a personal action that prescribes in 10 years,¹¹⁷ running from the moment the buyer defaults on the payment of the credit portion of the price. Applying the rule that the right of dissolution is independent of the vendor's privilege and is not dependent on the preservation of the privilege, the Court reaffirmed earlier holdings to the effect that the right of dissolution may be exercised even if the notes given to evidence the price have prescribed.¹¹⁸ The Court rejected an argument that this rule was altered by a 1924 amendment to Civil Code article 2561 making the right of dissolution an accessory to the credit representing the price.¹¹⁹ Nevertheless, the rule established in *Louis Werner Saw Mill Co.* was ultimately altered in the 1993 revision of the law of sales: If an instrument is given to evidence the price, the right of dissolution now prescribes at the same time and in the same period as the

full, and rejecting arguments that mortgagee, as the drawee bank, knew that a check given to the seller for the remaining balance of the purchase price had been returned for insufficient funds).

115. *Stevenson v. Brown*, 32 La. Ann. 461, 464 (1880). *See also* LA. CIV. CODE art. 2561 cmt. h (2015).

116. 17 So. 2d 264, 269 (La. 1944). *See supra* note 110.

117. *See* LA. CIV. CODE art. 3499 (2015).

118. *See, e.g., Sch. Dirs. v. Anderson*, 28 La. Ann. 739, 741 (1876) (holding that "the prescription of the notes given as evidence of the price does not affect [the right of action to dissolve a sale], the right to dissolve not being an accessory to but different from the right to enforce the payment of the price"); *see also Templeman v. Pegues*, 24 La. Ann. 537, 543 (1872) (spawning a dissent by Justice Howe complaining that, under the majority's holding, "the action to dissolve still exists—wandering about like a disembodied evil spirit"—a result he viewed to be "not a trifle worse than the system of unrecorded tacit mortgages from which we boast a recent deliverance").

119. According to the court's opinion:

By amending and reenacting Article 2561 of the Code so as to provide that 'This right of dissolution shall be an accessory of the credit representing the price', the Legislature evidently did not intend to put the 'right to dissolve' on 'all-fours' with the accessory right of mortgage and vendor's privilege 'as regards the term of its existence'.

In other words, it did not intend to change the prescriptive period applicable to actions to enforce the resolutive condition.

Louis Werner Saw Mill Co., 17 So. 2d at 269.

instrument.¹²⁰ The vendor's privilege, being an accessory right, is also extinguished when the underlying obligation prescribes.¹²¹

It is equally important, in the case of the sale of movables, not to confuse the seller's right of dissolution with the right of revendication, or restitution as it is known in Civil Code articles 3229 through 3231. Originally, the right of revendication afforded to the unpaid seller who did not grant a term for payment was viewed in France as a simplified and expeditious means of dissolving a sale when the conditions for its exercise were satisfied.¹²² In time, however, this theory was rejected. Unlike the action in dissolution, exercise of the right of revendication leaves the contract intact, its goal being simply to return possession of the thing sold to the seller so that he can again exercise his right of retention.¹²³ The right of revendication, leading to restoration of the seller's right of retention,¹²⁴ protects the seller against the possibility of loss of the vendor's privilege, which would be extinguished by the buyer's further alienation of the movable.¹²⁵

120. LA. CIV. CODE art. 2561 (2015).

121. LA. CIV. CODE art. 3277 (2015). *See, e.g.*, *Dassau v. Seary*, 158 So. 2d 243, 244–45 (La. Ct. App. 1963) (holding that where a promissory note secured by a vendor's privilege on an immovable contained an automatic acceleration clause, it prescribed five years after default and the vendor's privilege of necessity became unenforceable, because the principal obligation had prescribed).

122. *See* BEUDANT ET AL., *supra* note 18, § 521.

123. The seller who exercises the right of revendication finds himself in exactly the same place in which he was before delivery. Exercise of the right of revendication is not antithetical to exercise of the right of dissolution. Once the seller regains possession, he can either enforce payment of the price through the exercise of his privilege or, if he prefers, institute an action to dissolve the sale. However, the seller does not necessarily demand the dissolution of the sale by exercising his right of revendication. *See* BAUDRY-LACANTINERIE ET AL., *supra* note 26, Nos. 520–536. Although Huc admits that this is the prevailing view, he maintains that a better interpretation of the article allowing the right of revendication is that it enables the seller to dissolve the sale of right under the limited circumstances of the article, without incurring the delay and risks inherent in pursuing a judicial action for dissolution. HUC, *supra* note 42, Nos. 100–102.

124. The seller's right of retention, found presently in Louisiana Civil Code article 2487, is founded on the idea that, in the synallagmatic contract of sale, it is the buyer who should first perform by paying the price. Of the two parties to the sale, the buyer places himself less at risk by being the first to perform since, as owner of the thing sold, he can revendicate the thing in the hands of the seller and force delivery without coming into competition with the seller's creditors. The right of retention does not exist in the case of a credit sale because the seller has agreed to grant the buyer credit and therefore must perform first. *See* BEUDANT ET AL., *supra* note 18, § 507.

125. Though Louisiana Civil Code articles 3229 through 3231 contemplate that the seller can “prevent the resale” of the thing sold, he cannot undo a resale

VI. REGISTRY

To affect third persons, a vendor's privilege on an immovable must be recorded in the mortgage records by the express command of article 3271 of the Civil Code.¹²⁶ Recordation in the conveyance records alone is insufficient to preserve the privilege.¹²⁷ In order for the privilege to enjoy a preference over previously recorded mortgages, it must be recorded within the period prescribed by article 3274 of the Civil Code.¹²⁸ If not recorded within that period, the privilege enjoys no preference over mortgages that were previously filed and has "effect against all parties from date of registry."¹²⁹ Vendor's privileges on immovables are subject to the same requirements of reinscription that apply to mortgages.¹³⁰

On the other hand, the law generally excuses the requirement of recordation of privileges on movable property, except as otherwise prescribed by law.¹³¹ Because the law does not otherwise prescribe, the vendor's privilege on movables thus exists without the

that has already been made. *See* LA. CIV. CODE arts. 3229–3231 (2015); *Hill v. Morgan*, 4 Mart. (n.s.) 475, 480 (La. 1826).

126. *See also* LA. CIV. CODE arts. 3338, 3346 (2015); LA. CONST. art. XIX, § 19 (1921); *Morrison v. Trudeau*, 1 Mart. (n.s.) 384 (La. 1823). Registry is unnecessary for the preservation of the privilege between the parties. *See* *Schutzman v. Dobrowolski*, 186 So. 338, 341 (1939) (interpreting Louisiana Civil Code article 3271 to refer only to the rights of third persons and not the immediate parties to the contract of sale).

127. *Verges v. Prejean*, 24 La. Ann. 78, 78–79 (1872); *White v. Union Bank*, 6 La. Ann. 162, 164 (1851). *Woodward v. Investors-Ryan*, 600 So. 2d 855, 858 (La. Ct. App. 1992), applied this rule to an assumption deed, holding that its recordation in the conveyance records did not preserve the vendor's privilege arising from the assumption. *See also* *Comm'r of Ins. v. Terrell*, 647 So. 2d 445 (La. Ct. App. 1994) (holding that where an act of sale did not mention a promissory note that had been given to evidence the unpaid purchase price or otherwise indicate that the sale was made on credit, but at the same time a mortgage was executed to secure this note, any vendor's privilege the seller might have had was not properly preserved by the recordation of the act of sale only in the conveyance records, and the vendor's privilege was therefore subordinate to a previously recorded judgment against the purchaser. The court rejected arguments that anyone looking at the recorded act of sale and mortgage should have seen that the transaction was in the nature of a credit sale and would have been put on notice of the existence of the vendor's privilege).

128. LA. CIV. CODE art. 3274 (2015). The period is 7 days if the property is located in the same parish where the act was passed; otherwise, the period is 15 days.

129. *Id.*

130. LA. CIV. CODE arts. 3357–3365 (2015).

131. LA. CONST. art. XIX, § 19 (1921).

requirement of recordation.¹³² However, under the express wording of the Civil Code, the vendor's privilege is lost when the vendee no longer possesses the movable.¹³³ Thus, in the absence of an assumption, a second buyer who obtains possession of a movable takes free of a vendor's privilege held by his seller's vendor.¹³⁴ Recordation of the vendor's privilege on a movable does not cause it to follow the movable into the hands of a third person, nor does recordation of some other privilege on a movable give that privilege priority over an unrecorded vendor's privilege on the same movable.¹³⁵

At one time, there was considerable controversy over whether a vendor's privilege on a movable had to be recorded in the mortgage records in order to remain enforceable against third persons after the movable became immobilized. As more fully discussed below, that controversy appears to have been resolved by a number of holdings to the effect that no registry is required.¹³⁶

VII. VENDOR'S PRIVILEGES AS REAL RIGHTS

If the Latin maxim *adheret visceribus rei* is a reliable guide, it would seem that vendor's privileges must necessarily constitute real rights, for adhering to the very viscera of a thing might even be viewed as somewhat of a definition of a real right. As it turns out, this inference would undoubtedly be correct in the case of immovables. In contrast, for the vendor's privilege on movables, the issue is as complex as its resolution is uncertain.

Before turning to the interesting question of the status of vendor's privileges as real rights, it is useful to formulate a workable definition of what is meant by the term.¹³⁷ In a comprehensive article on the subject written in 1963,¹³⁸ Professor A. N. Yiannopoulos writes that

132. See YIANNOPOULOS, *supra* note 76, § 232.

133. LA. CIV. CODE art. 3227 (2015).

134. This issue is considered in depth below in the discussion of whether vendor's privileges constitute real rights. See discussion *infra* Part VII.

135. *German v. Nat'l Cash Register Co.*, 5 Teiss. 184, 187 (La. Ct. App. 1908).

136. Nonetheless, the very existence of the vendor's privilege following immobilization is now doubtful, irrespective of the recordation issue. See discussion *infra* Part VIII.E.

137. The term *real right* is nowhere defined in the articles of the Louisiana Civil Code. *But see* LA. CIV. CODE art. 476 cmts. b, d (2015); LA. CIV. CODE art. 1763 cmt. b (2015). Article 1763 defines a real obligation as the duty correlative and incidental to a real right, and comment (b) to that article includes a definition of a real right as "a right in a thing that can be held against the world." LA. CIV. CODE art. 1763 & cmt. b (2015).

138. A.N. Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part I*, 23 LA. L. REV. 161 (1963) [hereinafter Yiannopoulos, *Real Rights*].

the traditional definition of a real right in France is “said to involve subjection of a thing, in whole or in part, to the authority of a person by virtue of a direct relationship which can be asserted against the world.”¹³⁹ He concludes that real rights are ultimately distinguishable from personal rights in France by the presence of two essential attributes: the right to follow and the right of preference.¹⁴⁰ It seems to be a fair inference from his work that these same two defining characteristics are, or at least should be, observed in Louisiana.¹⁴¹ Privileges, of course, by their very nature always involve a right of preference. It follows then that a privilege can be classified as a real right only if it also entails a right of pursuit of the thing sold in the hands of third persons.¹⁴²

There is little doubt of the nature of vendor's privileges on immovables as real rights.¹⁴³ Planiol refers to them as “veritable mortgages” and includes them among the “privileged mortgages.”¹⁴⁴ But, he emphatically insists that privileges on movables—the vendor's privilege included—are mere rights of preference:

But for all the other privileged creditors [i.e., other than those holding special privileges on immovables and pledges], no real right exists. Only those are real rights which protect a person against all others in the total or partial possession of a thing. Such are ownership, usufruct, servitudes, emphyteusis,¹⁴⁵

139. *Id.* at 171.

140. *Id.* at 174. In French terminology, these characteristics are known as the *droit de suite* and the *droit de préférence*. At Roman law, privileges conferred only a right of preference assertable against the creditors of the debtor and did not include any right of pursuit. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, at i.

141. See also YIANNPOULOS, *supra* note 76, § 215.

142. F. LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS No. 314 (2d ed. 1878) (asserting that, even though privileges on movables do not include a right of pursuit, it would be error to conclude that they are not real rights, for the fact that a right exists in a thing suffices for the right to be considered a real right). According to Laurent, the absence of a right of pursuit results not from the nature of privileges on movables but rather from application of the doctrine of *la possession vaut titre*. See also *id.* No. 485 (specifically referring to the vendor's privilege on a movable as a real right).

143. YIANNPOULOS, *supra* note 76, § 232. For recent cases affirming the principle that a vendor's privilege on an immovable follows the property into the hands of third persons, see *Newman v. Livingston Parish Police Jury*, 603 So. 2d 250, 253 (La. Ct. App. 1992), and *Verret v. Rougeau*, 579 So. 2d 1239, 1240 (La. Ct. App. 1991).

144. PLANIOL & RIPERT, *supra* note 10, Nos. 2548, 2886. See also BAUDRY-LACANTINERIE ET AL., *supra* note 26, at ii; VETTER & HARRELL, *supra* note 14, at 155.

145. Professor Yiannopoulos describes emphyteusis as an institution of Greek law borrowed by Roman law consisting of “a contract according to which

pledge; such is also the mortgage, because it tends to leave the thing to the creditor and authorizes the latter to transfer the ownership to another. In privileges there is nothing like that: It is a simple right of priority between creditors, a permit to come in out of turn in the division of the price, and it is thus that the law looks upon it in defining it “as a right which the creditor has to be preferred.”¹⁴⁶

Laurent¹⁴⁷ and Aubry and Rau¹⁴⁸ are in accord. However, a number of French commentators disagree. For instance, in response to the argument that the vendor of a movable has no right of pursuit because a creditor is not permitted to seize things that have been alienated by his debtor, Baudry-Lacantinerie counters that “all privileges, the privileges on movables like privileges on immovables, are real rights” and that “real rights engender a right of pursuit.”¹⁴⁹

In *Liquid Carbonic Corp. v. Leger*,¹⁵⁰ the court embraced the notion that a vendor’s privilege on a movable, unlike a duly recorded chattel mortgage, is a mere right of preference giving the creditor no right of pursuit:

Furthermore, the courts of this state should note a difference between a privilege which confers a right of preference and

one delivered to another a piece of land either in perpetuity or for a long period of time, the recipient undertaking the obligation to cultivate the land and to pay an annual rent.” Yiannopoulos, *Real Rights*, *supra* note 138, at 185. *See also* YIANNOPOULOS, *supra* note 76, § 225. Emphyteusis was known under the Louisiana Civil Code of 1870 as the “rent of lands” governed by articles 2779 through 2792. *See* YIANNOPOULOS, *supra* note 76, § 225. These articles were left intact without revision in the 2004 revision of the law of lease, but the real right known as the rent of lands was suppressed in the 2012 adoption of the annuity charge. *See* LA. CIV. CODE art. 2787 (2015), *enacted by* Act No. 258, 2012 La. Acts 1698.

146. PLANIOL & RIPERT, *supra* note 10, No. 2548. *See also* BAUDRY-LACANTINERIE ET AL., *supra* note 26, Nos. 361–363 (explaining that, on account of the rule of *la possession vaut titre*, privileges on movables, whether general or special, confer only a right of preference and no right of pursuit).

147. According to Laurent, the fact that the Civil Code provides that the vendor’s privilege on a movable is lost when the buyer no longer has possession does not mean that it necessarily continues to exist so long as the buyer retains possession. Upon the buyer’s alienation of the thing, the privilege is lost because it is no longer within his patrimony and his creditors thus no longer have recourse against it. *See* LAURENT, *supra* note 142, Nos. 478–479.

148. AUBRY ET RAU, *supra* note 20, § 261.

149. “*On peut répondre tout d’abord que tous les privilèges, les privilèges sur les meubles comme les privilèges sur les immeubles, sont des droits réels. Or the droits réels engendrent un droit de suite . . .*” BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 495 (author’s translation).

150. 169 So. 170 (La. Ct. App. 1936).

one which also gives the additional right to follow the property on which it rests into the hands of a third person or persons. . . .

This distinction is marked by the French commentators in apt phrases. Under their nomenclature, privileges of the first class, which are by far the most numerous, confer a “*droit de préférence*” only, while those of the second class confer in addition a “*droit de suite*.” It is the holder of a privileged debt of the first class who is obliged to intervene by way of third opposition and to ask for a separate appraisal and sale of the property on which he has a privilege in order to preserve his rights when said property is seized in globo with other property of the debtor by a third person. The reason is obvious. In such a case, the property passes to the purchaser free of encumbrances. The contest for preference is then fought out over the proceeds. . . .¹⁵¹

Professor Yiannopoulos asserts that the entire controversy of whether privileges on movables create real rights is “without purpose” in Louisiana because, contrary to the practice in France where legal classification drives the consequences, Louisiana courts “are seldom inclined to derive practical consequences from abstract qualifications” (i.e., abstract labels). He maintains that the process is in effect reversed in Louisiana, with the classification of the privilege as real or personal being made “only in light of its function.”¹⁵² Thus, the question becomes whether, from a functional standpoint, the vendor’s privilege on a movable can be regarded as a real right. Under both the *Code Napoléon* and the Louisiana Civil Code, the vendor’s privilege on a movable exists only for as long as the movable remains in the possession of the vendee.¹⁵³ Thus, continued possession—rather than continued ownership—by the vendee appears to be the critical factor. It is clear that if the vendee re-sells the thing to a third person who has taken possession, the

151. *Id.* at 173–74. As the court in *Liquid Carbonic* notes, it is not only a private sale that will cause the holder of a privilege to lose his rights; the same effect will result from a judicial sale, even if the sale is made at the instance of a creditor holding an inferior privilege or an unsecured creditor. In order to preserve his rights, the holder of the superior privilege must intervene to assert his rights to the proceeds from the sale. In any event, he has no right of pursuit against the property, even though his right is superior to that of the seizing creditor.

152. See Yiannopoulos, *Real Rights*, *supra* note 138, at 223–24; YIANNOPOULOS, *supra* note 76, § 231.

153. LA. CIV. CODE arts. 3217, 3227 (2015); CODE CIVIL [C. CIV.] art. 2102 (Fr.) (1804). The same rule is found in article 2332 of the current French Civil Code. See CODE CIVIL [C. CIV.] art. 2332 (Fr.).

privilege is lost, even if the original vendor and vendee have attempted to derogate from this rule by agreement.¹⁵⁴ But, the vendee might very well have sold the thing to a second buyer, yet remain in physical possession. Does the original vendor's privilege persist? Planiol observes that the concept that a vendor's privilege is available "as long as the effects sold are still in the possession of the debtor" is borrowed from ancient authors, who probably meant "not having been alienated by him."¹⁵⁵ According to Planiol, it is not the fact of possession but rather the fact of alienation that must be considered. Thus, if the buyer pledges or deposits the thing sold, the privilege still subsists, because the buyer is still the possessor of the thing by the intermediation of another. In the situation in which the buyer has alienated the thing but has not yet delivered possession, Planiol notes that some authors believe that the privilege subsists because the thing is still in the possession of the buyer, but he argues that this is error because the original vendee now holds precariously for his own buyer. Since the thing has passed from the patrimony of the original seller's debtor, it is no longer the common pledge of his creditors, and to seize it again despite the alienation would give him a right of pursuit that the law does not permit.

As Planiol himself observes, his views on this issue are by no means universally accepted. For instance, Beudant¹⁵⁶ argues that the possession requirement is a simple application of article 2279 of the French Civil Code: *En fait de meubles, la possession vaut titre*.¹⁵⁷ Thus, the vendor's privilege is lost when the thing is sold *and* delivered to a third person who is in good faith, that is, who is unaware of the continued existence of the vendor's privilege.¹⁵⁸ Mere alienation does not cause a loss of the privilege or a right of pursuit to enforce it, because delivery of "real possession" is essential to the third person's ability to invoke the protection of *la possession vaut titre*.¹⁵⁹

154. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 491; BEUDANT ET AL., *supra* note 18, § 511; HUC, *supra* note 42, No. 91.

155. PLANIOL & RIPERT, *supra* note 10, No. 2618.

156. BEUDANT ET AL., *supra* note 18, § 511.

157. In English: With respect to movables, possession is equivalent to title (author's translation). See CODE CIVIL [C. CIV.] art. 2276 (Fr.) (formerly article 2279).

158. BEUDANT ET AL., *supra* note 18, § 511; BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 491; HUC, *supra* note 42, No. 91.

159. BEUDANT ET AL., *supra* note 18, § 511. Similarly, Baudry-Lacantinerie asserts that the vendor's privilege on a movable can still be exercised if the buyer has sold the thing to a second buyer who has not yet taken possession; however, if possession has been delivered to the second buyer, exercise of the original seller's privilege is "paralyzed" by application of the doctrine of *la possession vaut titre*. BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 495.

*Dreyfous v. Cade*¹⁶⁰ is an early example of the application in Louisiana of the rule that delivery of possession to a second buyer will cause a loss of the vendor's privilege. In that case, the buyer of certain items of agricultural equipment on credit placed them on his plantation for its service and improvement and then sold both the plantation and the equipment to a third person. Afterward, the original seller of the equipment sought to enforce a vendor's privilege against the second buyer. The Court held that, with very limited exceptions,¹⁶¹ the vendor's privilege on movable property exists only so long as the property remains in the possession of the vendee.¹⁶² Because the equipment had left the possession of the original buyer, the vendor's privilege was no longer enforceable.¹⁶³ The Court held that this result was not altered by the fact that the second buyer "may have known of the embarrassed circumstances of his immediate vendor."¹⁶⁴ On this point, the Court's holding

According to Baudry-Lacantinerie, if there has been no delivery, there is no real exercise of a right of pursuit, because the exercise of a right of pursuit presupposes that the thing is in the hands of a third person.

160. 70 So. 231 (La. 1915).

161. See, e.g., Act No. 63, 1890 La. Acts 51 (allowing the seller of agricultural products of the United States in any chartered city of the state to have a special privilege for a period of five days after delivery, within which he can seize the products in whosoever hands they may be found); see also *supra* note 44.

162. The jurisprudence has held that delivery of a warehouse receipt or bill of lading covering goods that are affected by a vendor's privilege is considered to constitute actual delivery of the goods, extinguishing the vendor's privilege. See, e.g., *Fetter v. Field*, 1 La. Ann. 80, 83-84 (1846); *Laughlin v. Ganahl*, 11 Rob. 140, 143 (La. 1845).

163. Another factor behind the Court's decision in *Dreyfous* was that the equipment, with the plaintiff's knowledge, had become immovable by destination and, since the contract out of which the privilege arose was unrecorded, the Court found that it became utterly null and void against the purchaser of the plantation under the rule of *McDuffie v. Walker*, 51 So. 100 (La. 1909). See *Dreyfous*, 70 So. at 233. The Court's holding on this point would now appear questionable in light of subsequent jurisprudence. See discussion *infra* Part VIII.E.

164. *Dreyfous*, 70 So. at 232. Professor Daggett maintains that the Court's holding on this point applies only in the absence of fraud, and if the resale is made in bad faith for the purpose of defeating the vendor's privilege, the court will not further the vendee's purpose by decreeing the privilege lost. See DAGGETT, *supra* note 32, § 51. For another case holding that a second buyer's knowledge of the existence of an existing vendor's privilege on a movable does not cause the vendor's privilege to survive a sale to that buyer, see *Queen City Broad. Co. v. Wagenwest, Inc.*, 264 So. 2d 336 (La. Ct. App. 1972). In *Queen City*, the court held that where equipment is sold subject to, but without assumption of, a debt owed to the seller's own vendor, the vendor's privilege is

diverges from the views of most French writers, who maintain that the vendor's privilege is not lost when possession is delivered to a second buyer who knows of the existence of the privilege because that second buyer is not in good faith and therefore not protected by the doctrine of *la possession vaut titre*.¹⁶⁵

But what of Planiol's example of the pledge of a thing that is burdened by a vendor's privilege? Planiol, and most if not all other French writers, maintain that the privilege persists, because the thing still belongs to the vendee and remains in his possession by virtue of the precarious possession exercised by his pledgee.¹⁶⁶ The Supreme Court was presented with precisely this issue in *Pierson v. Carmouche*¹⁶⁷ on certification of a question from the court of appeal. The question was formulated as follows:

May a purchaser on credit of movable property validly give it in pledge to a third person, who knows that he has not paid the price (but is otherwise in good faith), so as to vest in the pledgee a right superior to that of the vendor, whose privilege thereupon ceases by reason of the property having passed out of the possession of the vendee?¹⁶⁸

Though the Supreme Court answered the question in the affirmative, its opinion recites no facts, and it is impossible to determine whether the Court held that the vendor's privilege was wholly lost or that the vendor's privilege was simply outranked by the rights of the pledgee.¹⁶⁹ The only support given by the Court for its

extinguished, rejecting an argument by the original vendor that the second vendee's knowledge of the existence of the vendor's lien should preserve it. *Id.*

165. See *supra* note 158.

166. See, e.g., BAUDRY-LACANTINERIE ET AL., *supra* note 26, Nos. 492-493 (expressing the view that the buyer still possesses the thing after he delivers it to pledgee, lends it to a friend or deposits it with a depositary. All of those persons possess under precarious title for the buyer as owner. Thus, even though the buyer does not physically detain the thing under these circumstances, the privilege of his vendor is nonetheless preserved. The rule that the pledgee is preferred to the vendor under these circumstances results from application of the doctrine of *la possession vaut titre*, at least if the pledgee is in good faith.); see also LAURENT, *supra* note 142, No. 483; HUC, *supra* note 42, No. 91.

167. 84 So. 59 (La. 1920).

168. *Id.* at 59.

169. Professor Yiannopoulos cites *Pierson v. Carmouche* for the proposition that "a pledge constituted on a thing subject to a vendor's privilege involves transfer of possession and terminates the privilege of the vendor." Yiannopoulos, *Real Rights*, *supra* note 138, at 226 n.301. On the other hand, Professor Daggett appears to espouse the view that *Pierson v. Carmouche* should be interpreted as a ranking case rather than a case involving the outright loss of a vendor's privilege. See DAGGETT, *supra* note 32, § 51; see also Ralph

answer to the question was the holding of *Dreyfous v. Cade*; however, that case involved a second sale (an alienation) and not a mere pledge by the purchaser. If *Pierson* means that the vendor's privilege is lost when the purchaser pledges the property, it would certainly contradict the concepts expressed by Planiol and other French writers.

A Comment appearing in the *Tulane Law Review* in 1929 addressed this very topic—the kind of possession by a vendee necessary to maintain the continued validity of a privilege in favor of his vendor.¹⁷⁰ Though the student author of this Comment, Bessie Margolin,¹⁷¹ certainly could not have envisioned it at the time, her scholarly research and thoughtful analysis would, nearly four decades later, persuade the federal courts to hold that the vendor's privilege on a movable is effective against a bankruptcy trustee.

In the 1968 bankruptcy case of *In re Trahan*,¹⁷² the issue facing the court was whether the vendor's privilege held by a seller that had supplied merchandise to a furniture store was enforceable against the bankruptcy trustee after the furniture store applied for bankruptcy relief. Two years earlier, Congress amended the Bankruptcy Act in order to invalidate any statutory lien that was not perfected or enforceable on the date of a bankruptcy filing against one acquiring the rights of a bona fide purchaser from the debtor on that date. Finding first that a vendor's privilege meets the definition of a "statutory lien," the court noted the rule under the Civil Code that if the original vendee resells the thing to a third-party purchaser who

Slovenko, *Of Pledge*, 32 TUL. L. REV. 59, 69 (1958) (opining that the vendor's privilege is surely not lost when the vendee lends or bails the property).

170. See Margolin, *supra* note 37.

171. For a recent biography of Bessie Margolin, see Marlene Trestman, *Fair Labor: Remarkable Life and Legal Career of Bessie Margolin (1909-1996)*, 37 J. SUP. CT. HIST. 43 (2012). The daughter of Russian immigrants, she spent her childhood from age four at the New Orleans Jewish Orphans home. *Id.* at 42–43. After two years at Newcomb College, she transferred to Tulane University to begin the study of law. *Id.* at 46. In 1930, at age 21, she received both a bachelor's degree and her law degree from Tulane, having served as civil law editor of the *Tulane Law Review*, in which she wrote three comments, including one on vendor's privileges, cited *supra* note 37. *Id.* at 46–47. Three years later, she received her doctorate of juridical science from Yale University, but her credentials entitled her to no better offer of employment on Wall Street than in a firm's law library. *Id.* at 47–48. Undaunted, she seized upon the opportunity to join the legal staff of the newly created Tennessee Valley Authority. *Id.* at 48. Later, she had an outstanding career at the Department of Labor in the enforcement of the Fair Labor Standards Act and the Equal Pay Act, arguing 26 cases before the United States Supreme Court. *Id.* at 49–54. Retired Chief Justice Earl Warren was the speaker at her formal retirement dinner in 1972. *Id.* at 69. She died in 1996 at age 87. *Id.* at 70.

172. 283 F. Supp. 620 (W.D. La. 1968).

takes possession, the privilege of the original vendor is lost. Nonetheless, the court held that a vendor's privilege survives a bankruptcy filing.

In reaching this holding, the court quoted extensively from Bessie Margolin's Comment, in which she outlined the majority view of the French commentators that a resale of the property by the vendee does not divest the original vendor of his privilege unless there is actual physical delivery to the second vendee, the views of Planiol and other members of the vocal minority notwithstanding. The court also cited her analysis that three additional articles found in the 1870 Louisiana Civil Code but not found in the French Civil Code—articles 1922, 1923 and 2247¹⁷³—were even greater justification in Louisiana for the majority view of the French commentators that a vendor's privilege survives a subsequent sale by the vendee when unaccompanied by delivery. Those articles provided that the sale of a movable does not affect third parties until actual delivery of the object is made and that creditors of a seller may still seize a movable he has sold while it remains in his possession. In holding that the vendor's privilege survived the bankruptcy filing, the *Trahan* court placed great weight upon the argument that, because a sale unaccompanied by delivery is not effective against third persons, and because the seller's creditors, including presumably his own unpaid vendor, still have the right to seize his assets, the vendor's privilege should remain effective until delivery occurs.¹⁷⁴ The Fifth Circuit affirmed the *Trahan* ruling in a per curiam opinion.¹⁷⁵

173. See LA. CIV. CODE art. 518 (2015).

174. The court also reviewed the jurisprudence, including *Continental Bank & Trust Co. v. Succession McCann*, 92 So. 55 (La. 1922), which reaffirmed that a vendor's privilege primes a subsequently arising chattel mortgage and rejected an argument that the execution of the mortgage was an alienation causing the loss of the vendor's privilege. Another case cited was *Flint v. Rawlings*, 20 La. Ann. 557 (1868), in which the Court held that a vendor's privilege on movables continues as long as the vendee has possession, but is lost by a subsequent sale and actual delivery to a third person. Regardless of whether the second sale is simulated or real, it has no effect upon the vendor's privilege in the absence of actual delivery. *In re Trahan*, 283 F. Supp. at 626. The court also cited *Wilson v. Lowrie*, 101 So. 549, 550 (La. 1924) (holding that a vendor's privilege on drilling pipe was lost when the vendee sold and delivered the pipe to a third person). A final case cited by the *Trahan* court was *Alex Kuhn & Co. v. Embry*, 35 La. Ann. 488 (1883), which appears to provide scant authority for the proposition for which it is cited. In that case, the vendor sought sequestration of mules for fear that the defendant might dispose of them. *Alex Kuhn*, 35 La. Ann. at 488. The plaintiff established by evidence that the defendant had in fact sold the mules. *Id.* at 488–89. The Court found that the fact of the sale of the mules justified the plaintiff's apprehensions regarding their potential disposition by the defendant. *Id.* There was no discussion of the possible extinguishment of the vendor's privilege or the effect of the non-delivery of the mules. *Id.* at 489.

The *Trahan* analysis was rejected by the United States Court of Appeals for the First Circuit in the case of *In re J.R. Nieves & Co.*,¹⁷⁶ which involved a consideration of whether a vendor's privilege arising under the Puerto Rican Civil Code was avoidable in bankruptcy. The *Nieves* court felt that the reality of whether the bankrupt vendee still had possession was irrelevant to the issue and that it would be "ridiculous" to require a debtor to bring all of his possessions to the bankruptcy trustee at the time he files his bankruptcy petition. As the court put it, when Congress spoke of a hypothetical purchaser, "it contemplated a full blooded, not an anemic, purchaser."¹⁷⁷ The court did concede that Louisiana sales law is different from that of Puerto Rico, which apparently does not allow ownership of a movable to transfer in the absence of delivery. Thus, the possibility relied upon by the *Trahan* court of a hypothetical purchaser having acquired ownership even though not yet in possession did not exist under Puerto Rican law.

After the new Bankruptcy Code was adopted in 1978, a Louisiana bankruptcy court considered in the case of *In re Hughes*¹⁷⁸ whether the holding of *Trahan* remained valid. Voiding the vendor's privilege, the court found the *Trahan* analysis to be faulty because it "overlooked the fundamental issue of whether the device could be defeated by a bona fide purchaser by improperly emphasizing whether or not such a purchaser existed in the case under consideration."¹⁷⁹ The *Hughes* court based its holding at least in part upon legislative history indicating a desire to adopt a stronger position toward statutory liens under the Bankruptcy Code. The court invited the Fifth Circuit to examine more closely this "vexing problem" in light of the adoption of the Bankruptcy Code. The Fifth Circuit did in fact consider the issue the following year in *In re Tape City USA*,¹⁸⁰ but it re-affirmed the *Trahan* holding under the new Bankruptcy Code without even a passing mention of either *Nieves* or *Hughes*.

Ironically, even though the *Trahan* court would later quote her summation of the majority view of the French commentators in support of its holding, Margolin actually wrote that "[t]he real right argument is weak and has been ably refuted by those

Indeed, it is not clear from the case whether the mules were ever delivered to the second purchaser or from whose hands they were seized. *Id.*

175. *In re Trahan*, 402 F.2d 796 (5th Cir. 1968).

176. 446 F.2d 188 (1st Cir. 1971).

177. *Id.* at 192.

178. 9 B.R. 251 (W.D. La. 1981).

179. *Id.* at 256.

180. 677 F.2d 401 (5th Cir. 1982).

commentators in the minority who say that the vendor's privilege is lost by a resale even though there has been no delivery."¹⁸¹ She felt that a more convincing reason in support of the majority view was that the word "*possession*" in article 2102 of the French Civil Code,¹⁸² which provides that the privilege exists only so long as the original buyer remains in possession, refers to *physical* possession. Those French commentators in the majority support this argument by citing the rule of *la possession vaut titre* under article 2279 of the French Civil Code.¹⁸³ As the argument goes, the unmodified use of the word "*possession*" in article 2279 must plainly mean physical possession, and the article should be used to interpret what is meant by the same word in article 2102.¹⁸⁴ However, Margolin felt that the majority took an inconsistent view when confronted with the issue—faced by the Louisiana Supreme Court in *Pierson*—of whether a vendor's privilege is extinguished when the vendee enters into a pledge, loan, or bailment of the thing sold. She points out that, in that case, the French commentators almost unanimously agree that the privilege is not lost, even though the vendee no longer has physical possession and exercises only civil possession.¹⁸⁵ Margolin favored the consistent "civil possession" theory of article 3227 of the Louisiana Civil Code (as opposed to actual possession) because that theory would allow the object in question to be pledged, loaned, or bailed without destruction of the vendor's privilege. Consistently applied, this theory would, of course, mean that a privilege is lost if there is a sale to a purchaser who does not take immediate physical delivery. The second purchaser would have civil possession, and the original vendee's mere physical possession would be insufficient to maintain the vitality of the vendor's privilege. She asserted that this rule would make little practical difference, because the original vendor would still have the right to seize the property as a general

181. Margolin, *supra* note 37, at 245.

182. See CODE CIVIL [C. CIV.] art. 2332 (Fr.).

183. See discussion *supra* Part VII.

184. This reasoning has even greater appeal when it is remembered that the limitation arising under former article 2102 of the French Civil Code (now article 2332) is itself a specific application of the doctrine of *la possession vaut titre*. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 491; BEUDANT ET AL., *supra* note 18, § 511.

185. See, e.g., BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 492. It might be countered, however, that this view is not necessarily as inconsistent as Margolin asserts. Beudant explains that, when the thing is delivered to another person under a loan, lease or deposit, that person possesses precariously for the owner, who thus continues to have possession. It is different when the thing is pledged, for in that case the pledgee is a "quasi-possessor." BEUDANT ET AL., *supra* note 18, § 511.

creditor of his vendee under article 1923 of the 1870 Code.¹⁸⁶ But, if that were the case, the unpaid vendor would be in competition with all other creditors of his debtor and would not enjoy the preference over other creditors that is the very purpose of his privilege. More importantly, however, federal bankruptcy law has developed in a way Margolin could not have anticipated so that there is now a huge practical and legal difference: Following her civil possession theory, with the result that the privilege is lost immediately upon the vendee's sale to a second buyer irrespective of delivery, would mean that the vendor's privilege on a movable would of necessity be a voidable statutory lien in bankruptcy court.

In Louisiana, attempting to interpret the possession requirement of Civil Code articles 3217(7) and 3227 on the basis of *la possession vaut titre* would rest on precarious footing indeed, because that doctrine is of questionable effect in this state and may not apply at all.¹⁸⁷ Perhaps a better approach would be to return to the literal text of these code articles, which use the word "possession" without any qualification. When these articles speak of possession, they must mean exactly that—any kind of possession, whether exercised corporeally by the vendee or exercised by a precarious possessor on his behalf. Thus, when the vendee retains physical possession after a second sale, the privilege held by his vendor is preserved. If the vendee delivers physical possession to someone, such as a pledgee, whose possession is precarious, the vendor's privilege is still preserved, since the precarious possession is for the benefit of the vendee.¹⁸⁸ Only when the vendee fully relinquishes possession is the privilege lost, as when the vendee delivers physical possession to a second buyer.

Purists might object that this approach improperly transforms the vendor's privilege on a movable into a real right, because the privilege would survive a second sale that is unaccompanied by delivery. Although there is certainly room for disagreement on that issue among French commentators, that objection would appear

186. See LA. CIV. CODE art. 518 (2015).

187. The Louisiana Civil Code of 1870 did not include a provision analogous to French Civil Code article 2279. The 1979 revision of the Civil Code articles in the law of property enacted a new article 520, which provided that a transferee in good faith and for fair value acquires ownership of a corporeal movable if the transferor had possession with the consent of the actual owner. However, that article was repealed by Act 125 of 1981, while the surrounding articles that presupposed its existence were left intact, thus creating considerable uncertainty over the rights of a good faith transferee. See YIANNPOULOS, *supra* note 76, § 232; see also Tanya Ann Ibieta, Comment, *The Transfer of Ownership of Movable*, 47 LA. L. REV. 841 (1987).

188. LA. CIV. CODE art. 3437 (2015).

unfounded under the Louisiana Civil Code because of its rule that transfer of ownership of a movable is effective against third persons when possession is delivered to the transferee and, until that occurs, creditors of the transferor can seize it.¹⁸⁹ Thus, until possession is delivered to the transferee, the alienation that Planiol and others argue extinguishes the privilege is simply not effective as to third persons, including the transferor's unpaid vendor and other creditors, who may ignore the alienation altogether. Moreover, there is a justification for the survival of the privilege under these circumstances: Since all of the transferor's creditors continue to have recourse against the thing, a privilege is necessary so that the unpaid vendor will still be preferred over those creditors in the proceeds of the thing. To the extent that this causes the vendor's privilege on a movable to function as a real right,¹⁹⁰ it is a very limited and ephemeral one that owes its existence more to the rules on transfer of ownership of a movable than to the rules applicable to privileges.

There is at least one circumstance under which a vendor's privilege on a movable will appear to survive a second sale by the vendee even after delivery has been made to the second buyer: when this second buyer assumes payment of the debt owed by his seller to the original vendor. Under those facts, the court in *Central Finance Co. v. Keating*¹⁹¹ held, based on *De L'Isle*,¹⁹² that the original vendor was entitled to assert a vendor's privilege against the second buyer, notwithstanding the original vendee's loss of possession.¹⁹³

189. LA. CIV. CODE art. 518 (2015).

190. Because the vendor's privilege on a movable exists only for as long as it remains in the possession of the vendee, Professor Yiannopoulos is emphatic that, as to movables, "it is quite clear from the Code and the cases that the vendor's privilege is merely a right of preference which may be exercised as long as the thing remains in the physical possession of the debtor." Yiannopoulos, *Real Rights*, *supra* note 138, at 229. *See also* YIANNOPOULOS, *supra* note 76, § 232. Professor Daggett observes that:

The question of whether or not the vendor's privilege confers a real right in the property or creates merely a preference unattached to the property itself has not been definitely settled. The court has not committed itself in so many words, but the trend of the decisions indicates that the court considers it a real right in the property which has not been paid for.

DAGGETT, *supra* note 32, § 36, at 94.

191. 6 La. App. 155 (Ct. App. 1927).

192. 34 La. Ann. 164 (1882).

193. *See Central Finance*, 6 La. App. at 155; *see also* *Cormier v. Castille*, 488 So. 2d 247 (La. Ct. App. 1886) (holding that the original sellers' vendor's privilege was not lost when the property was sold to a second buyer who assumed the debt owed to the original sellers in an act in which the original sellers joined and the original buyer remained bound as a solidary co-obligor); *cf. Queen City Broad. Co. v. Wagenwest, Inc.*, 264 So. 2d 336 (La. Ct. App.

What the court must have meant, and all that *De L'Isle* would have supported, is that a new vendor's privilege arose in favor of the original vendor by virtue of the second buyer's assumption of the balance still owed to him.¹⁹⁴

VIII. LOSS OF VENDOR'S PRIVILEGE

As discussed in the preceding section, alienation of a movable burdened by a vendor's privilege, coupled with delivery, causes the loss of the vendor's privilege. Alienation of an immovable subject to an unrecorded vendor's privilege will also cause a loss of the privilege by operation of the public records doctrine.¹⁹⁵ As an accessory right, a vendor's privilege is, of course, extinguished when the vendee's obligation to pay the price becomes extinguished for any reason and also when that obligation prescribes.¹⁹⁶ A number of other events can also deprive the vendor of his privilege.

A. *Novation*

Does a vendor's action in accepting a note to evidence the purchase price extinguish the privilege, on the theory that the

1972) (holding that where equipment is sold subject to, but without assumption of, a debt owed to the seller's own vendor, the vendor's privilege is extinguished).

194. There are a few cases involving unusual circumstances under which a vendor's privilege on a movable was held to survive a second sale. In *Hooper v. Maruka Machinery Corp. of America*, 525 So. 2d 1113 (La. Ct. App. 1988), the court held that a vendor's privilege upon an item of equipment continued to exist after it was sold to a second buyer that immediately leased it back to the original buyer. The court's rationale did not, as might have been expected, focus upon the continued possession by the original buyer but rather the facts that the majority stockholder of the original buyer was the managing partner of the second buyer and that this person had concocted a scheme, apparently not in good faith, which, if followed, would effectively "remove the teeth" from a vendor's privilege. See also *Warren Refrigerator Co. v. Fosti Midstream Fueling & Serv., Inc.*, 462 So. 2d 1343 (La. Ct. App. 1985) (holding that a vendor's privilege on a movable is viable so long as the right to possession of the movable remains in the vendee, although others "without color of right" have taken physical possession of the movable).

195. See Yiannopoulos, *Real Rights*, *supra* note 138, at 226.

196. LA. CIV. CODE art. 3277 (1870). See also *AUBRY ET RAU*, *supra* note 20, § 292; HUC, *supra* note 42, No. 112. Thus, where a buyer tenders payment of the entire remaining balance of the purchase price before the seller files suit seeking to enforce a contractual right of retrocession, both the right of retrocession and the seller's vendor's privilege are extinguished. *Vermilion Sand Co. v. H. & D. Sand & Gravel Co.*, 304 So. 2d 378 (La. Ct. App. 1974). See also *Cormier v. Ransom*, 420 So. 2d 1227 (La. Ct. App. 1982).

acceptance of the note constitutes a novation of the vendee's obligation to pay the price? Although there might once have been some disagreement on this point among French writers,¹⁹⁷ the Louisiana Civil Code of 1825 added an express provision to the effect that the vendor nonetheless enjoys the privilege even though he may have taken a note, bond, or other acknowledgment from the vendee.¹⁹⁸ The same rule applies even if the note is not made payable to the vendor but, by arrangement between the parties, is payable to a third person.¹⁹⁹

B. Waiver

In *Pratt v. Hart Jewelry Co.*,²⁰⁰ the court found an implied waiver of the vendor's privilege when a husband purchased a gold purse from a jeweler and, in the jeweler's presence, donated it to his wife.

The long-established rule is that a vendor's privilege and a mortgage may co-exist on the same property, and one of them might be renounced or extinguished without affecting the other.²⁰¹ In *Succession of Osborn*,²⁰² the Court held that a vendor, by knowingly accepting part payment of the purchase price from a third person

197. See Margolin, *supra* note 37, at 240 n.7.

198. LA. CIV. CODE art. 3194 (1825). See also LA. CIV. CODE art. 3227 (1870); *Adler v. Burton Lumber Co.*, 15 So. 156 (La. 1894) (observing that no extinguishment resulted from vendor's acknowledgment that payment had been made by the giving of notes).

199. See *Jeckell v. Fried*, 18 La. Ann. 192 (1866) (holding that where the seller was indebted at the time of the sale to a third person and, by agreement of the parties, the note given for the purchase price was made payable to this third person in order to satisfy a debt owed to him by the seller, the holder of the note was entitled to a vendor's privilege on the property sold). But see *Cottonport Bank v. Dunn*, 21 So. 2d 525 (La. Ct. App. 1945) (finding a lack of sufficient proof in the record to demonstrate the arrangement between the parties and why the note in question was made payable to a bank rather than the vendor of the equipment). Professor Daggett infers a number of other rules from the caselaw: The execution of a renewal note does not constitute a novation or destroy the privilege. A compromise between the vendor and vendee as to the price, whereby a new note is made changing the amount of the debt and extending the term, does not destroy the privilege. However, where a note of a third party is given, particularly without the purchaser's endorsement, the giving of the note constitutes payment of the price and the vendor's privilege is extinguished. This is especially true where the third party's note is endorsed without recourse. See DAGGETT, *supra* note 32, § 51.

200. 14 Teiss. 94 (La. Ct. App. 1916).

201. *Graves v. Joyce*, 590 So. 2d 1261 (La. Ct. App. 1991); *State ex rel. Landry v. Broussard*, 177 So. 403 (La. Ct. App. 1937); *Boner v. Mahle*, 3 La. Ann. 600 (1848).

202. 4 So. 580 (La. 1888).

who lent funds to the purchaser on the condition that the vendor allow the third person's mortgage to be a first mortgage, had renounced the rank of his vendor's privilege in favor of the third-party lender.²⁰³ By contrast, in *Howard v. Thomas*,²⁰⁴ the Court in effect held that a seller's agreement not to reserve a special mortgage on the land did not constitute a waiver of his vendor's privilege. In *Citizens Bank of Louisiana v. Cuny*,²⁰⁵ the vendor caused to be written on the face of the act of sale, at the time it was recorded, a recitation to the effect that he was releasing the mortgage stipulated in the act of sale "without, however, acknowledging the payment of the price of the purchase money."²⁰⁶ The Court found this not to constitute a renunciation of his vendor's privilege.²⁰⁷ In *Bacchus v. Moreau*,²⁰⁸ the Court held that, because a mortgage and a vendor's privilege are distinct rights, an act of sale providing that a mortgage is reserved only on a certain portion of the property sold does not constitute a waiver of the vendor's privilege on the remainder of the property. Similarly, in *Boner v. Mahle*,²⁰⁹ the Court held that the vendor's failure to take a mortgage on the property sold, though he did take a mortgage on other property, could not be construed to be a waiver of his vendor's privilege on the property sold. According to the Court, the implied renunciation of the important right of a vendor's privilege "should be established, not by doubtful, but by clear and cogent inferences from the language of the parties."²¹⁰

203. See *Osborn*, 4 So. at 580; see also *Hyster Co. v. Reeves*, 541 So. 2d 363 (La. Ct. App. 1989) (holding that, even though an unrecorded vendor's privilege would ordinarily prime a chattel mortgage that is later recorded in compliance with the vehicle certificate of title law, the seller through its conduct waived its right to assert the vendor's privilege by failing to note the vendor's privilege on the vehicle's certificate of origin and failing to record its chattel mortgage in the proper records, thus showing no reliance on the vendor's privilege and an apparent intent for the buyer to deal with third parties in a way that would defeat the vendor's privilege). According to the opinion, a vehicle dealer who sells a vehicle to another on credit and gives the vendee sufficient paperwork to allow that vendee to obtain a clear certificate of title waives his vendor's privilege.

204. 3 La. 109 (1831).

205. 12 Rob. (La.) 279, 280 (1845).

206. *Id.*

207. Apparently it was significant to the court that no third person had relied to his prejudice on the gratuitous release of the mortgage.

208. 4 La. Ann. 313 (1849).

209. 3 La. Ann. 600 (1848).

210. *Id.* at 603. Compare *id.*, with *Hunter v. Sandel*, 160 So. 87 (La. 1935). In *Hunter*, a co-owner sold by credit sale all of her interest in the property to her three co-owners, each of whom executed a promissory note and granted a mortgage on other lands he owned as security for his own note. *Hunter*, 160 So. at 87. The Court held that the vendor waived her vendor's privilege on the interest she sold, although it would appear that the actions relied upon by the Court as evidence of waiver were, at least viewed individually, scant evidence of

*Pelican Homestead & Savings Ass'n v. Royal Scott Apartments Partnership*²¹¹ involved a simultaneous closing at which the same notary public passed an act of cash sale from the vendors to the vendee, a first mortgage from the vendee in favor of a building and loan association, and a second mortgage from the vendee to the vendors as security for a portion of the sales price which apparently remained unpaid. The act of cash sale recited that the entire purchase price had been paid, and the second mortgage in favor of the vendors specifically subordinated the mortgage to the rights of the building and loan association. Nonetheless, at the time of the foreclosure by the association, the vendors intervened, claiming that their vendor's privilege was superior to its rights. The court rejected this claim primarily on the ground that the act of sale by its terms gave "full acquittance and discharge" for the purchase price,²¹² thus expressing a clear intent to waive the vendor's privilege.²¹³

a waiver. First, the obligation to pay the purchase price was intended to be the several obligations of each of the vendees, whereas the Court believed that retaining a vendor's privilege would necessitate joint liability. Secondly, the act of sale used the words "said \$50,000 being paid as follows," thus indicating the promissory notes were taken as final payment for the balance. Third, the promissory notes were paraphrased for identification "with this act of mortgage" rather than with the act of sale. The pact de non alienando was contained only in the mortgages, and not in the act of sale. Finally, the act of sale was recorded in the mortgage records only in those parishes where the specially mortgaged property was located, and not in other parishes in which the property sold was located. A more recent case finding an implied waiver of the vendor's privilege is *Graves v. Joyce*, 590 So. 2d 1261 (La. Ct. App. 1991), in which a credit sale provided that "this mortgage" did not encumber specified lots. According to the court, the language in the credit sale declared an intent by the vendor to release certain lots and any third person relying on the public records would not have been alerted by the language of the release that the vendor intended to preserve his vendor's privilege on the lots released from the mortgage. *Id.* at 1263.

211. 541 So. 2d 943 (La. Ct. App. 1989).

212. *Id.* See also *City Bank & Trust Co. v. Caneco Constr., Inc.*, 341 So. 2d 1331 (La. Ct. App. 1977); *Alison Mtg. Inv. Trust v. BPB Contractors, Inc.*, 362 So. 2d 1203 (La. Ct. App. 1978) (holding that, where an act of sale recited that the vendor had been paid in full, even though the seller had in fact taken two promissory notes for a large portion of the purchase price, any vendor's privilege that the seller might have retained was subordinate to a mortgage executed in favor of a third-party lender, notwithstanding the fact that the lender's representative was present at the closing of the sale and knew that a portion of the purchase price had been paid in notes). Both cases cite *McDuffie v. Walker* for the rule that even actual knowledge is not a substitute for the requirement to properly record privileges. See *McDuffie v. Walker*, 51 So. 100 (La. 1909). Another case held that where the mortgage records stated that partial payment had been made in cash when in fact drafts were given for the partial payment, the holder of the drafts could not be paid from the proceeds of the property in preference to innocent persons to whom notes given for the

Must the vendor's spouse concur in granting a waiver or subordination of the vendor's privilege burdening an immovable? One case, in dicta, suggests that the concurrence of both spouses is required for subordination, because a vendor's privilege on an immovable is an incorporeal immovable and, according to the court, subordination is an alienation of the right to a preference in ranking requiring the concurrence of both spouses.²¹⁴ The same logic would, *a fortiori*, apply to an outright waiver of the vendor's privilege encumbering an immovable.

C. Transformation into Another Movable

There is no textual provision in either the *Code Napoléon* or the Louisiana Civil Code that directly addresses the issue on whether a vendor's privilege survives the transformation of the thing into another movable, as when a block of stone is transformed into a statue,²¹⁵ hops into beer,²¹⁶ wheat into flour, or grapes into wine.²¹⁷ The French article allowing the right of revendication to the unpaid seller of a movable²¹⁸ requires that the thing be "in the same

remainder of the purchase price had been transferred. *See* Durham v. Heirs of Daughtery, 30 La. Ann. 1255 (1878); *see generally* HUC, *supra* note 42, No. 112 (indicating that the vendor's privilege on an immovable "can exist only on the condition that the act of sale reveal to third persons the amount of the price and the fact that it has not been paid").

213. The court also observed that the language of subordination in the second mortgage furnished at least some support for a finding of a waiver of the vendor's privilege. Curiously, the court felt that its finding of waiver was further bolstered by the absence of any recordation of the vendor's privilege in order to protect the vendors against third persons. It would appear that that fact alone, irrespective of the issue of waiver or subordination, would have been sufficient to defeat the claims of the vendors, since they had not preserved their privilege against third persons, and the building and loan association was a third party to the sale.

214. *Cf.* First Fed. Sav. & Loan Ass'n of Warner Robins, Ga. v. Delta Towers, Ltd., 544 So. 2d 1331 (La. Ct. App. 1989). Nevertheless, the court held that the spouse who did not sign the act of subordination had nonetheless renounced her right to concur by executing a modification agreement containing a declaration that her husband was the owner and holder of the note secured by the vendor's privilege and in any event had ratified the subordination by signing tax returns taking advantage of the substantial tax benefits attributable to the subordination.

215. *See* Margolin, *supra* note 37, at 240 n.5.

216. *See* PLANIOL & RIPERT, *supra* note 10, No. 2614.

217. *See* BEUDANT ET AL., *supra* note 18, § 512.

218. CODE CIVIL [C. CIV.] art. 2101(4) (Fr.). *See* CODE CIVIL [C. CIV.] art. 2332(4) (Fr.).

condition.”²¹⁹ Because of the absence of any similar textual limitation on the vendor’s privilege,²²⁰ Planiol notes that an argument has arisen that the privilege should persist so long as the identity of the thing can be followed through its transformations.²²¹ Interestingly, the 1825 Louisiana Civil Code dropped the “same condition” requirement in the article governing revendication under the Digest of 1808,²²² substituting the formulation that “the identity of the objects be established.”²²³ Arguably, this more liberal standard should also apply by analogy to the vendor’s privilege.²²⁴

219. In French this phrase is: “*dans le même état*,” a phrase that was translated in the English version of the Digest of 1808 as “in the same condition.” See LA. DIGEST OF 1808, *supra* note 52. A more literal translation would be “in the same state.”

220. One French treatise indicates that the absence of this limitation on the vendor’s privilege cannot be logically explained, speculating that the redactors of the *Code Napoléon* had perhaps forgotten that they had modified the principles of transfer of ownership and that the Roman notions of revendication based on ownership therefore no longer applied. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 534; cf. LAURENT, *supra* note 142, No. 485 (expressing the view that, in theory, the privilege should be subject to the requirement of being “in the same condition” that applies to the right of revendication, which is established merely to conserve the privilege, but the legislator has nonetheless wisely chosen not to include that requirement as a condition for the exercise of the privilege, since the vendor has enriched the patrimony of the debtor, regardless of the fact that the thing sold may have later changed in state).

221. PLANIOL & RIPERT, *supra* note 10, No. 2614. See, e.g., BAUDRY-LACANTINERIE ET AL., *supra* note 26, No. 501 (expressing the view that the vendor’s privilege persists notwithstanding the transformations in the thing sold, so long as the thing sold is still be recognizable). Thus, if the buyer of wood has transformed it into charcoal, the seller can still exercise his privilege on the charcoal; however, the seller of hops cannot exercise his privilege on the beer made with them. See also BEUDANT ET AL., *supra* note 18, § 512 (asserting that the thing subject to the privilege must remain recognizable, if not in the same condition); cf. HUC, *supra* note 42, Nos. 96–98 (acknowledging the prevailing rule that a change in the state of the thing is no obstacle to enforcement of the vendor’s privilege, but arguing that a thing that has changed in condition is necessarily no longer recognizable and that application of the “in the same condition” rule to the vendor’s privilege would place the existence of the privilege in harmony with the rules on revendication designed to preserve it).

222. LA. DIGEST OF 1808, *supra* note 52, art. 74.

223. LA. CIV. CODE art. 3196 (1825). See LA. CIV. CODE art. 3229 (1870).

224. See YIANNOPOULOS, *supra* note 76, § 232, at 463–64. A modern example of the requirement that the separate identity of the movable not have been lost is found in *Aetna Business Credit Corp. v. Louisiana Machinery Co.*, 409 So. 2d 1304 (La. Ct. App. 1982), in which the lessee of a drilling rig pump had caused a replacement engine to be bolted to the pump but the engine could be easily removed without damage to either the pump or itself. The court held that the rule of accession under Louisiana Civil Code articles 482 and 510 did not apply and that the seller of the replacement engine continued to have a vendor’s privilege upon the engine, which had retained its separate identity.

D. Sale with a Mass of Things

Civil Code article 3228 provides that the vendor's privilege on a movable is lost when the vendor allows the thing to be sold "confusedly with a mass of other things belonging to the purchaser" without making his claim. At first blush, this article seems to be wholly unnecessary in light of the rule that any resale of a movable subject to an existing vendor's privilege, if accompanied by delivery to the second buyer, causes a loss of the vendor's privilege. As Professor Yiannopoulos explains, this article can be viewed analytically as the combination of a loss of identity of the thing in tandem with a loss of the original purchaser's possession.²²⁵ Professor Daggett argues that the article has effect only when the movable subject to the vendor's privilege, though sold with a mass of other goods, remains in the hands of the original buyer or when a mass of property has been sold and the contest is over the proceeds of the sale.²²⁶ Thus, the article can be viewed as an exception to the general rule of Civil Code article 3228, which ordinarily allows a vendor to proceed against goods that have been re-sold so long as they remain in the original buyer's hands. Application of the article under these circumstances extinguishes the vendor's privilege, even though the thing remains in the hands of the immediate buyer.²²⁷

E. Incorporation into an Immovable

When a movable burdened by a vendor's privilege is incorporated into or attached to an immovable so as to become its component part, a number of difficult issues arise. Is the privilege lost by virtue of the attachment? Does the privilege remain enforceable against third persons, such as a mortgagee who holds or later acquires a mortgage on the immovable? Does it matter whether the vendor's privilege was recorded? Will the vendor's privilege survive an enforcement of the mortgage or other alienation of the immovable?

225. Yiannopoulos, *Real Rights*, *supra* note 138, at 228.

226. See DAGGETT, *supra* note 32, § 51.

227. Professor Daggett finds no policy justification for this exception. For modern cases involving contests over the proceeds from a sale in mass, see *Louisiana State Employees' Retirement System v. Campo Realty Co.*, 380 So. 2d 1377 (La. Ct. App. 1980), and *Weber v. Press of H. N. Cornay, Inc.*, 144 So. 2d 581 (La. Ct. App. 1962). Both cases cite Louisiana Civil Code article 3228 for the proposition that a vendor's privilege is lost when the property subject to the privilege is sold *in globo* with other things unless the holder of the privilege demands separate appraisal of the property subject to the privilege prior to the sale.

To understand the jurisprudence bearing upon these issues, it is important first to recall the rules of the 1870 Civil Code governing the classification of immovables.²²⁸ Under that regime, there were immovables by nature that served the use or convenience of a building,²²⁹ immovables by destination that were merely placed upon a tract of land for its service or improvement,²³⁰ and immovables by destination consisting of things that were permanently attached to a building.²³¹

The easiest case to consider is that involving a thing that becomes immovable by destination simply by virtue of its placement upon a tract of land for service or improvement. The case law has had no difficulty holding that, in this instance, the vendor's privilege is unaffected.²³² However, this rule is not particularly important today because of the suppression of this classification of immovable by destination, although the rule might be applied by analogy to things that are immovable by mere declaration under article 467 of the present Civil Code.

228. See generally Elizabeth Ruth Carter, Comment, *Ghosts of the Past and Hopes for the Future: Article 466 and Societal Expectations*, 81 TUL. L. REV. 1665 (2007); John A. Lovett, *Another Great Debate?: The Ambiguous Relationship Between the Revised Civil Code and Pre-Revision Jurisprudence as Seen Through the Prytania Park Controversy*, 48 LOY. L. REV. 615 (2002); A.N. Yiannopoulos, *Of Immovables, Component Parts, Societal Expectations and the Forehead of Zeus*, 60 LA. L. REV. 1379 (2000); YIANNOPOULOS, *supra* note 76, § 142.5.

229. LA. CIV. CODE art. 467 (1870).

230. LA. CIV. CODE art. 468(1) (1870).

231. LA. CIV. CODE art. 468(2) (1870). The type of attachment needed was explained in Article 469, which set forth something similar to the now familiar "substantial damage" test: The owner was supposed "to have attached to his tenement or building forever such movables as are affixed to the same with plaster, or mortar, or such as can not be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached." LA. CIV. CODE art. 469 (1870). The 1978 revision of the Civil Code replaced the 1870 Code's classification scheme with three articles: article 465, dealing with movables that are incorporated into an immovable; article 466, dealing with movables that are permanently attached to an immovable; and article 467, dealing with movables that are made immovable by declaration. Over the ensuing years, article 466 has seen substantial revision, the last occurring with the enactment of Act No. 632, 2008 La. Acts 2573. The author was the reporter of the Louisiana State Law Institute Committee that drafted the most recent revision to article 466.

232. *Shelly v. Winder*, 36 La. Ann. 182 (1884) ("This Court has adopted the view of Troplong, to the effect: 'That the purchaser of such movables as mules, agricultural implements, etc., cannot affect the rights of the vendor thereof by impressing upon them the purely metaphysical quality of immovables. The thing sold subsists in all its parts just as it was when sold, without any change in its nature, or otherwise, except in its destination; and such destination is considered as imperfect and subordinated to the rights of the vendor.'").

The issue becomes more difficult when the thing is physically, rather than just intellectually, attached to an immovable.²³³ In the 1857 case of *Gary v. Burguières*, involving an engine that had been attached to a sugar mill, the Supreme Court held that the mortgagee foreclosing on the immovable took free of a vendor's privilege on the engine because the contract giving rise to the vendor's privilege had not been recorded.²³⁴ A few decades later, the Court in *Carlin v. Gordy*²³⁵ was presented with a case in which the contract establishing the vendor's privilege on the movable had in fact been recorded. Critical of its own prior holding in *Gary*, which was in any event readily distinguishable on account of the lack of recordation in the earlier case, the Court formulated the rule that the vendor's privilege should continue notwithstanding the attachment of a movable to an immovable if the movable can be removed without damage to the structure to which it is attached.²³⁶

The Supreme Court further refined the governing rule in two cases decided in the 1930s. In *Caldwell v. Laurel Grove Co.*,²³⁷ the Court reaffirmed earlier holdings to the effect that a movable remains subject to a vendor's privilege notwithstanding its immobilization by attachment, so long as the movable can be identified and reclaimed in substantially the same condition as when sold and without material injury to the structure to which it is attached, even though use of the structure may be temporarily impaired. The movables in *Caldwell* consisted of railroad materials that had been used in the construction on a mortgaged plantation of a railroad track that could be removed

233. Some French writers view the ultimate issue to be whether the thing has been incorporated into an immovable so as to become an immovable by nature, rather than being immobilized by the legal fiction of destination. However, even in the latter case, they assert that the vendor's privilege cannot be exercised to the prejudice of a mortgagee, just as it cannot be exercised to the prejudice of a pledgee. See BAUDRY-LACANTINERIE ET AL., *supra* note 26, Nos. 502–504; BEUDANT ET AL., *supra* note 18, § 512; HUC, *supra* note 42, No. 95.

234. *Gary v. Burguières*, 12 La. Ann. 227 (1857).

235. 32 La. Ann. 1285 (1880).

236. See *In re Receivership of Augusta Sugar Co.*, 64 So. 870 (La. 1914); *Pratt Eng'g & Mach. Co. v. Cecelia Sugar Co.*, 65 So. 100 (La. 1914). However, neither of these opinions reflects whether the contract establishing the vendor's privilege was recorded or discusses any recordation issue. A pair of decisions in the second decade of the twentieth century held that gears and shafts, and railroad ties, lost their character as movables and lost their identity when incorporated into an immovable. See *Milliken v. Roger*, 70 So. 848 (La. 1916); *Morgan's La. & T. R. & S. S. Co. v. Himalaya Planting & Mfg. Co.*, 78 So. 735 (La. 1918). These holdings were, however, overruled in *Caldwell v. Laurel Grove Co.*, 144 So. 718 (La. 1932).

237. *Caldwell*, 144 So. at 718.

without any injury at all to the plantation.²³⁸ The vendor of the railroad materials was thus allowed to assert its privilege against the holder of a mortgage on the plantation. In *Globe Automatic Sprinkler Co. v. Bell*,²³⁹ which involved an automatic sprinkler system that had been installed in a factory, the Court held that the vendor's privilege remained intact, summarizing the law as follows:

And the uniform jurisprudence of the state is where machinery or mechanical equipment is installed in a building by the owner but can be removed without substantial injury to the structure to which it is attached, *even though it is necessary to temporarily destroy part of the building*, the vendor's lien attaches and is enforceable.²⁴⁰

Another issue presented in *Globe Automatic Sprinkler Co.* was whether the vendor's privilege on a movable that had become attached to an immovable could survive the buyer's transfer and delivery of the immovable to the mortgagee under a giving in payment. Somewhat surprisingly, the Court held that the privilege survived. The Court's reasoning was that, if the mortgagee had been relegated to enforcing its rights judicially, protections would have been available to the unpaid vendor. According to the Court, "[t]he parties' substitution of a non-judicial proceeding for a judicial proceeding cannot have the extraordinary effect of obliterating all claims and privileges acquired by third persons against the property while it was in the possession of the purchaser."²⁴¹ Thus, the Court seemed to afford the vendor with a right of pursuit after *dation en paiement*, as opposed to after any other sort of voluntary alienation or a judicial sale.²⁴²

238. The Court expressly overruled its prior contrary holding in *Morgan's Louisiana & T.R.*, which had presented "practically similar" facts. The holding in *Caldwell* was itself later overruled by the Louisiana Supreme Court. See *Am. Creosote Co. v. Springer*, 241 So. 2d 510 (La. 1970); see also discussion *supra* Part VIII.E.

239. 165 So. 150 (La. 1935).

240. *Id.* at 152 (emphasis added).

241. *Id.*

242. Cf. *Royal Oldsmobile Co. v. Yarbrough*, 425 So. 2d 823 (La. Ct. App. 1983). In that case, an attorney's client, in the attorney's presence, purchased an automobile that the client immediately gave to him in payment of his fee. *Id.* at 824. The client paid for the automobile with a check that was ultimately dishonored by the drawee bank. *Id.* Holding that the dealership's vendor's privilege was lost when the vehicle left the hands of the immediate purchaser (the client), the court found that, even though the attorney was present at the dealership to help select the car and had the title placed directly in his name, he did not undertake to buy the automobile or to pay the purchase price; rather, he simply agreed to accept the car in payment of the debt due him by his client. *Id.* at 825.

The Court also addressed in *Globe Automatic Sprinkler Co.* the issue of recordation, which *Gary* and other earlier cases seemed to find necessary to enable the vendor to assert his rights against third persons. Even though the vendor's contract in *Globe Automatic Sprinkler Co.* had in fact been recorded, the Court expressed its view, albeit in what certainly appears to be dicta, that the vendor's privilege was not destroyed "[i]rrespective of whether the recordation of a contract between the Globe Automatic Sprinkler Company and [the original buyer] was sufficient to bind the [mortgagee accepting the giving in payment]."²⁴³

Thus, the jurisprudence established the rule that the test of whether the vendor's privilege is lost is not whether the thing has been converted into an immovable by nature or destination but rather whether it can be removed without substantial injury to the immovable to which it is attached.²⁴⁴ As settled as this rule might have appeared by the mid-20th century, the Supreme Court appeared to chart an entirely new course in *American Creosote Co. v. Springer*,²⁴⁵ a case that did not even involve a claim of a vendor's privilege but, instead, presented a contest between a railroad company that had leased a railroad track to the owner of an immovable under an unrecorded lease and a third-party purchaser to whom this owner later sold the immovable. Deciding the contest in

243. *Globe Automatic Sprinkler Co.*, 165 So. at 152. Several years later, a court of appeal case lent further reinforcement to the principle that so long as "the movable has not lost its identity, and can be separated from the land, tenement, or building to which it has been attached without injury to the immovable, as to the vendor it remains a movable, and he may subject the same to his vendor's privilege, the registry of the same being immaterial." *Cristina Inv. Corp. v. Gulf Ice Co.*, 55 So. 2d 685, 690 (La. Ct. App. 1951). An earlier appellate court case had also reached the conclusion that recordation was unnecessary to protect the vendor, though by somewhat strained logic. *See Hamilton Co. v. Med. Arts Bldg. Co.*, 135 So. 94 (La. Ct. App. 1931). Because it had previously been held that an unrecorded vendor's privilege outranks a subsequently recorded chattel mortgage, the court in *Hamilton* deduced that the unrecorded vendor's privilege on a movable must necessarily prime a later recorded mortgage on the building to which the movable is attached:

It follows from this decision and others on the same subject that, if property has become immovable by destination and its identity is preserved, and it may be removed without material injury to building to which it is attached, and thereafter a chattel mortgage is placed on it, still the unrecorded vendor's lien may be enforced against to the prejudice of the chattel mortgage. A fortiori, it follows that a mortgage on the building wherein the immovable by destination is located does not prime the unrecorded vendor's lien.

Id. at 99. This reasoning implicitly assumes that a component part of a building could be subjected to a chattel mortgage after it had already been immobilized.

244. *See* DAGGETT, *supra* note 32, § 51.

245. 241 So. 2d 510 (La. 1970).

favor of the purchaser, the Court held that the railroad track was an immovable by nature and passed with the sale. In support of this holding, the Court cited its previously overruled holding in *Morgan's Louisiana & T.R. & S.S. Co. v. Himalaya Planting & Manufacturing Co.*,²⁴⁶ in which the Court had held that ties, rails, spikes, irons, plates, and ballasts lost their character as movables for purposes of the vendor's privilege "since such privileges can no more be enforced with respect to its several constituents without destroying the thing into which they have thus been merged than it can be enforced with respect to the canvas upon which a picture has been painted without destroying the picture."²⁴⁷

Even though *American Creosote Company* did not involve an unpaid vendor asserting a vendor's privilege, the Court nonetheless expressly overruled *Caldwell v. Laurel Grove Co.*, which itself had overruled *Morgan's Louisiana & T.R. & S.S. Co.* The Court intentionally chose not to distinguish *Caldwell v. Laurel Grove Co.* on the basis of the status of the parties involved or other facts, because it felt that such a distinction would be invalid as to the "real" issue of whether the rails constructed into a railway became immovable by nature. As to that proposition, the Court found that the two cases were irreconcilable, for if "a thing is immovable by nature, it is immovable as to everyone."²⁴⁸ What *American Creosote Company* implies with respect to the continued existence of a vendor's privilege on a movable following immobilization is not entirely clear. Given its most expansive interpretation, the case supports the proposition, albeit in dicta, that the vendor's privilege is irretrievably lost upon immobilization, regardless of whether the

246. 78 So. 735 (La. 1918).

247. *Id.* at 736.

248. *American Creosote Company*, 241 So. 2d at 515. The Court's premise that if "a thing is immovable by nature, it is immovable as to everyone" is questionable, specifically where security rights are concerned. *Id.* At the time the case was decided, the Chattel Mortgage Law provided that a thing subject to a chattel mortgage remained movable following attachment to an immovable insofar as the chattel mortgage was concerned. This provision, which was first enacted by Act No. 166, 1932 La. Acts 539, and later appeared as Louisiana Revised Statutes section 9:5357, represented a legislative reversal of the Court's prior contrary holding in *Baton Rouge Rice Mill v. Fairbanks, Morse & Co.*, 114 So. 633 (La. 1927). Thus, it certainly was possible at the time of the decision in *American Creosote Company* for a thing to be movable as to certain persons but immovable as to all others. Another example of a thing being considered movable only as to designated persons is found in Louisiana Civil Code article 474, which provides that unharvested crops and ungathered fruits encumbered with security rights of third persons are movables by anticipation "insofar as the creditor is concerned." LA. CIV. CODE art. 474 (2015).

movable subject to the privilege has retained its identity or can be removed without substantial injury to the immovable.

Since the Supreme Court's decision in *American Creosote Company*, the law governing component parts of an immovable has undergone at least three substantive changes.²⁴⁹ If, as that case suggests, immobilization imports a loss of the vendor's privilege, then each of these changes might have had some effect upon the rights of the unpaid vendor of a movable that becomes attached to an immovable. The courts have had occasion to revisit this issue only rarely. In *Hyman v. Ross*,²⁵⁰ perhaps the only case to consider the issue since the revision of Civil Code article 466 in 1978,²⁵¹ the court applied the "societal expectations test"²⁵² under article 466 to find that heating and air conditioning units sold to the owner of a hotel had become its component parts and were therefore encumbered under a mortgage previously granted upon the immovable. Although the seller of the heating and air conditioning units had moved for separate appraisal prior to the foreclosure sale of the immovable, the court found that the pre-existing mortgage attached to the units and therefore outranked the vendor's privilege, with no citation to the previous jurisprudence involving vendor's privileges or any reasoning other than that the units had become component parts of an immovable that was subject to a previously recorded mortgage. Without specifically citing *American Creosote Company*, the court appears to have followed its implication that the immobilization of a thing subject to a vendor's privilege necessarily implies a loss of the privilege.²⁵³

249. See *supra* note 231.

250. 643 So. 2d 256 (La. Ct. App. 1994).

251. See Act No. 728, 1978 La. Acts 1900.

252. See *Equibank v. U.S. IRS*, 749 F.2d 1176 (5th Cir. 1985).

253. If the attachment or incorporation of the movable occurs as a result of work for the improvement of the immovable, the seller does not lose all security, for he becomes entitled to a privilege upon the immovable as a seller of movables under the Louisiana Private Works Act. See LA. REV. STAT. ANN. § 9:4801(3) (2007); LA. REV. STAT. ANN. § 9:4802(A)(3) (Supp. 2015); RUBIN, *supra* note 82, § 37.11, at 252. Outside of situations covered by the Private Works Act, if the seller obtains a purchase money security interest in the thing sold and perfects this security interest by making a fixture filing in the Uniform Commercial Code records before attachment of the thing to an immovable, the purchase money security interest not only will survive attachment but will have priority over even a previously filed mortgage burdening the immovable. See LA. REV. STAT. ANN. § 10:9-334(d) (Supp. 2015). A "fixture" is defined to be a thing that, after placement on or incorporation in an immovable, or on account of a declaration of immobilization, has become a component part of the immovable under the Civil Code. *Id.* § 10:9-102(a)(41). A security interest cannot exist in ordinary building materials incorporated into an improvement on land. *Id.* § 10:9-334(a).

The present rule is far from clear. Insofar as it purported to address vendor's privileges, the decision in *American Creosote Company* was dicta. Professor Yiannopolous, acknowledging that the "test of loss of identity involves difficulties," cites *Hyman* for the proposition that a vendor loses his privilege when the thing subject to the privilege becomes a component part of an immovable under Civil Code articles 465 or 466. However, after reviewing the jurisprudence under the 1870 Code, which had established the rule that the vendor's privilege was lost only when the thing subject to the privilege had become incorporated to such an extent that its removal was physically impossible or economically unfeasible, he states that "whether the vendor's privilege primes a real mortgagee's right to claim things that become component parts of an immovable is ordinarily determined by reference to the test of facility of removal."²⁵⁴ Support can, of course, be found in the jurisprudence for all of these propositions, though they do not seem to be entirely consistent with each other. Until the Supreme Court rules again on the issue, uncertainty will likely persist.²⁵⁵

In those cases in which the vendor's privilege remains intact notwithstanding the attachment of the thing to an immovable, the vendor has two alternative remedies available to vindicate his rights and only a limited period of time within which to exercise them, as the court explained in *Walburn-Swenson Co. v. Darrell*.²⁵⁶ One remedy is to intervene seeking a separate appraisalment of the movable and proportionate payment from the entirety of the proceeds from the sale of the immovable. The other remedy is to seize and sell the movable on which the vendor's privilege rests in the enforcement of a judgment recognizing the privilege, even though the movable has become attached to an immovable. In *Walburn-Swenson Co.*, the remedy of separate appraisalment was

254. YIANNPOULOS, *supra* note 76, § 232, at 465.

255. It should be remembered that both *American Creosote Company* and *Hyman* involved claims by third persons having an interest in the immovable of which the thing subject to a vendor's privilege had become a component part. Perhaps there is still room for application of the "substantial injury" test that existed before *American Creosote Company* if the thing subject to a vendor's privilege becomes a component part of an immovable but the vendor is not in conflict with a third person having or acquiring an interest in the immovable. The approach of permitting a vendor's privilege to survive immobilization if the thing remains identifiable, yet refusing to allow it to be asserted after immobilization against a mortgagee or other third person having rights in the immovable, has been espoused by some French writers. See *supra* note 233.

256. 22 So. 310, 311 (La. 1897). The plaintiff in the case was the unpaid vendor of machinery that had been installed on a plantation. Mortgage creditors seized the plantation and, on the eve of its sale, the unpaid vendor applied for the separate appraisalment and sale of the machinery. *Id.* at 310.

refused in view of the untimeliness of the unpaid sellers' request just over an hour before the scheduled sheriff's sale to be held in enforcement of a mortgage upon the immovable; however, the Court held that the lower court should have granted injunctive relief to the sellers so that they could pursue the second remedy of provoking their own seizure and sale of the movable. The Court rejected the mortgagee's argument that the vendor's right to a separate sale was lost after the mortgagee had seized the property. As Professor Yiannopoulos explains the holding, the vendor can seize the movable as long as it remains in the hands of his vendee, and his right of seizure is not defeated because the mortgage creditor has seized the property or the judicial sale of the immovable is close at hand.²⁵⁷ If the vendor fails to exercise either remedy before the foreclosure sale of the immovable, the vendor's privilege is lost.²⁵⁸

IX. RANKING OF THE VENDOR'S PRIVILEGE ON MOVABLES

The articles found in the Louisiana Civil Code on ranking of privileges on movables originated in the Projet of 1825; they were not taken from the *Code Napoléon*. Planiol noted that the absence of a legislative ranking of privileges had the fortunate result of allowing time for "the doctrinal writers to study this matter and to arrive at scientific solutions."²⁵⁹ He asserted that the special privileges can be placed into three principal categories: those based on the preservation of the thing, those based on an implied pledge, and those based on augmentation of the patrimony.²⁶⁰ His arguments concerning the ranking of the privileges within each

257. Yiannopoulos, *Real Rights*, *supra* note 138, at 227–28; YIANNOPOULOS, *supra* note 76, § 232, at 465.

258. *See* Pan Am. Life Ins. Co. v. Reynaud, 4 La. App. 290 (Ct. App. 1926) (holding that the holder of a vendor's privilege upon a movable lost his privilege when he allowed the immovable to which it was attached to be sold at a foreclosure sale instituted at the request of a second mortgagee, without provoking a separate appraisal of the thing on which he claimed a privilege). Moreover, once the privilege was destroyed, a foreclosure upon the same immovable by the first mortgagee did not have the effect of reviving the privilege nor permitting the privileged creditors to ask for a separate appraisal in connection with the later foreclosure sale.

259. PLANIOL & RIPERT, *supra* note 10, No. 2622, at 460.

260. *Id.* No. 2637, at 465. *Cf.* AUBRY ET RAU, *supra* note 20, § 289 (concluding, based on inferences drawn from the few express ranking rules found in the French Civil Code, that special privileges on movables rank in the following order: (1) privileges based on the notion of an express or implied pledge; (2) preservation privileges; and (3) the vendor's privilege).

class and among classes have largely been accepted by modern French writers,²⁶¹ whose views might be summarized as follows:

1. Preservation privileges rank in inverse chronological order, because the preservation performed by each of them inures to the benefit of all who have come before.²⁶²
2. Among creditors holding an implied pledge, there is little opportunity for conflict unless a third party holds the thing for the benefit of more than one creditor. In that case, the rule of first in time, first in right applies.
3. Among two creditors whose privileges are based on augmentation of patrimony, such as two successive vendors, the first to arise primes, for the reason that the first seller is the creditor of the second seller for the unpaid price due to him. Also, this principle draws by analogy upon the rule ranking successive vendor's privileges upon immovables.

Between two privileges found within different classes, ranking is as follows:

- a. *Preservation versus pledge.* Preservation privileges arising after the pledge prime, because they inured to the benefit of the pledgee. Preservation privileges arising before the pledge are inferior if the pledgee was unaware of them, because the pledgee is entitled to the benefit of the doctrine of *la possession vaut titre*.²⁶³
- b. *Preservation versus augmentation of patrimony.* The preservation privilege primes, regardless of when the preservation occurred. If it occurred after the vendor's privilege arose, it primes because the preservation inured to the benefit of the vendor as privilege holder. If it occurred beforehand, the preservation privilege still primes because it inured to the benefit of the vendor when he was owner.
- c. *Pledge versus augmentation of patrimony.* The pledge primes by operation of the doctrine of *la possession vaut*

261. See, e.g., SIMLER & DELEBECQUE, *supra* note 75, §§ 784–791, at 706–10.

262. See also AUBRY ET RAU, *supra* note 20, § 289.

263. *Id.*

titre, unless the pledgee was aware of the earlier privilege. In that event, the pledge is inferior.²⁶⁴

In large measure, these principles find expression in a single ranking article of the French Civil Code adopted in 2006.²⁶⁵

As mentioned above, the Projet of 1825 added specific ranking rules to Louisiana's Civil Code, many of which are based upon this same logic. For example, the lessor's privilege outranks the vendor's privilege.²⁶⁶ This is because the lessor's privilege, at least historically, was based upon the notion of an implied pledge.²⁶⁷ An instance in which the Supreme Court applied these principles to a privilege for which the Civil Code gives no ranking rule at all is the artisan's privilege.²⁶⁸ In *Cozzo v. Ulrich*,²⁶⁹ the court held that the artisan's privilege has priority over the vendor's privilege, because the vendor has a mere privilege, while the artisan is entitled to a right of pledge, including the right to retain the object until payment. Interestingly, the statutory repairman's privilege,²⁷⁰ which does not carry with it any right or requirement of detention, is by the express wording of the statute subject to a vendor's privilege. Thus, the repairman has priority over the vendor so long as he retains possession and can claim an artisan's privilege under the Civil Code. If he relinquishes possession, he retains, for a short period of time, a statutory repairman's privilege that is subordinate to the vendor's privilege.

It is well known that there are myriad vicious circles in the ranking of privileges on movables.²⁷¹ The classic example of a

264. *Id.*

265. CODE CIVIL [C. CIV.] art. 2332–3 (Fr.).

266. LA. CIV. CODE art. 3263 (2015). For an application of this rule, see *Interstate Electric Co. v. Tucker*, 2 So. 2d 56 (La. 1941) (holding that a lessor's privilege primed a vendor's privilege on equipment, despite contentions by the vendor that the lessor and vendee were actually co-partners in a commercial partnership).

267. In the 2004 revision of the Louisiana Civil Code articles governing lease, the notion of an implied pledge was eliminated; thus, the superior ranking given to the lessor's privilege no longer has any doctrinal basis in Louisiana. See LA. CIV. CODE art. 2707 cmt. a (2015). However, comment (d) to article 2707 observes that the change in the article “does not affect either the nature or priority of the privilege vis-à-vis other creditors of the lessee.” This is undoubtedly correct insofar as competition with the vendor's privilege is concerned, even though its doctrinal underpinnings have been removed; Louisiana Civil Code article 3263 continues to rank the vendor's privilege behind the lessor's privilege.

268. LA. CIV. CODE art. 3217(2) (2015).

269. 14 Teiss. 137 (La. Ct. App. 1916).

270. LA. REV. STAT. ANN. §§ 9:4501, 4502 (2007 & Supp. 2015). The statutory and code privileges are independent, and neither limits the other.

271. See Joseph Dainow, *Vicious Circles in the Louisiana Law of Privileges*, 25 LA. L. REV. 1 (1964). The solution to vicious circles offered by Professor

vicious circle involved competition among the vendor, the chattel mortgagee, and the lessor. A debtor purchased movable property on credit, executed and recorded a chattel mortgage bearing upon this property, and then brought the property upon leased premises. The Civil Code gives the lessor priority over the vendor.²⁷² Under the former Chattel Mortgage Law, a chattel mortgage primed all privileges arising after the chattel mortgage was filed for public registry.²⁷³ Thus, under the facts assumed, the chattel mortgage would yield to the vendor's privilege but would have priority over the lessor's privilege.²⁷⁴ Fortunately, this vicious circle was eliminated by the adoption of the Uniform Commercial Code, which ranks security interests ahead of privileges held by both the vendor and the lessor.²⁷⁵ Thus, the priority of a modern day security interest

Dainow is to give effect first to the ranking of competing privileges provided by the latest legislation, even if this had the effect of re-ordering the priorities of some of these privileges established under prior legislation. For criticism of this solution, see RUBIN, *supra* note 82, § 32.2, at 227 (“The problem with looking at the last amended statute is that often this will not resolve the vicious circle, for almost never does the ‘last’ amended statute expressly refer to the ranking of three or more privileges.”).

272. LA. CIV. CODE art. 3263 (2015).

273. LA. REV. STAT. ANN. § 9:5354, *repealed by* Act No. 128, 2001 La. Acts 206. Although not repealed outright until 2001, the Chattel Mortgage Law had already been superseded with respect to transactions occurring after January 1, 1990 by the adoption of Chapter 9 of the Uniform Commercial Code, which became effective on that date. *See* Act No. 135, 1989 La. Acts 417.

274. Noting the existence of this vicious circle, Professor Dainow concludes that, by application of the later legislation embodied in the Chattel Mortgage Law, the proper ranking is (1) vendor's privilege, (2) chattel mortgage, and (3) lessor's privilege. *See* Dainow, *supra* note 271, at 5.

275. Under section 9-322(h) of the Uniform Commercial Code and section 10:9-322(h) of Louisiana Revised Statutes, security interests—whether perfected or not—outrank all privileges, unless the statute creating the privilege provides otherwise. *See* UCC § 9-322(h) (2010); LA. REV. STAT. ANN. § 10:9-322(h) (Supp. 2015). The Civil Code articles providing for the vendor's and lessor's privileges do not provide otherwise, and indeed section 9:4770 of Louisiana Revised Statutes specifically provides that the privileges of both the vendor and lessor are subordinate to Chapter 9 security interests. *See* LA. REV. STAT. ANN. § 9:4770 (Supp. 2015). As originally enacted, section 9:4770 expressly purported to subordinate even vendor's privileges that were in existence at the time of its enactment. The constitutionality of this retroactivity has not been challenged in a reported case and, in view of the passage of over a quarter century since the enactment of the statute, likely will not ever be raised. For a case involving competition between a Chapter 9 security interest and vendor's privileges, see *Tetra Applied Tech., Inc. v. H.O.E., Inc.*, 878 So. 2d 708 (La. Ct. App. 2004) (holding a perfected security interest in the accounts of a manufacturer to be superior to vendor's privileges claimed by the manufacturer's suppliers). The court relied upon *First National Bank of Boston v. Beckwith Machinery Co.*, 650

against these two privileges would be certain but different from the ranking that existed under the Chattel Mortgage Law: the first priority would be the security interest, which would prime the lessor's privilege, which would prime the vendor's privilege.

Numerous other vicious circles involving the vendor's privilege have arisen, chiefly because the Legislature has often shown a propensity to protect the vendor when creating a competing privilege.

A. Vendor/Widow/Lessor

The needy widow's privilege, which is a general privilege on both movables and immovables, was first established by Act 255 of 1852 and later incorporated into the Civil Code of 1870 as article 3252.²⁷⁶ The purpose of the privilege was poetically articulated in *Succession of White*:²⁷⁷

[T]o ward off from the widow and young children of one recently dead, the misery of unmitigated destitution, and to cover, as with a shield, these helpless mourners from the pitiless shafts of poverty, at the moment when the protecting arm of the husband and father was made powerless by death.²⁷⁸

The original text of the 1852 statute and of article 3252 of the 1870 Code provided that the widow's privilege was outranked by the vendor's privilege but was superior to all other debts.²⁷⁹ This led to the obvious possibility of a vicious circle in the ranking of privileges affecting movables, because the Civil Code ranks the vendor's privilege behind the lessor's privilege. In order to avoid this vicious circle, the Court in *Succession of Cooley*²⁸⁰ held that the reference to the "vendor's privilege" in article 3252 meant only

So. 2d 1148 (La. 1995), in which the Supreme Court held that a previously perfected Chapter 9 security interest has priority over a non-possessory materialman's privilege granted to a supplier of ship building materials under Louisiana Civil Code article 3237(8).

276. The privilege is sometimes known as the "widow's homestead" because the original purpose of the privilege, as stated in the title of the 1852 legislation, was to provide a homestead for the widow and children of deceased persons. However, the text of the statute did not tie the privilege in any manner to a homestead, thus leading to an unsuccessful constitutional challenge that the statute differed from its title. See *Succession of Lanzetti*, 9 La. Ann. 329 (1854).

277. 29 La. Ann. 702 (1877).

278. *Id.* at 703.

279. See Act No. 255, 1852 La. Acts 171; LA. CIV. CODE art. 3252 (1870).

280. 26 La. Ann. 166, 166-67 (1874).

the vendor's privilege on immovables, for otherwise an "awkward confliction" would arise.²⁸¹ The Court's valiant attempt at avoiding a vicious circle was ultimately thwarted, however, by Act 242 of 1918, which amended article 3252 to provide specifically that the widow's privilege is primed by vendor's privileges on both movable and immovable property. The 1918 Act also amended the article to provide that the widow's privilege is primed by all conventional mortgages,²⁸² thus, with apparent indifference to the consequences, establishing no fewer than four vicious circles through a single enactment of the Legislature.²⁸³

B. Vendor/Repairman/Lessor

The statutes creating the garageman's and repairman's privileges²⁸⁴ rank those privileges behind the vendor's privilege but not behind that of the lessor. Thus, the vendor primes the mechanic, who primes the lessor, who primes the vendor.²⁸⁵

281. Succession of Thompson, 12 Teiss. 24 (La. Ct. App. 1914).

282. See Act No. 242, 1918 La. Acts 433. Act 17 of 1917 provided that the widow's privilege would be outranked by conventional mortgages securing money lent for not less than one year at no greater than 6% per annum interest. These limitations were removed by the 1918 legislation. See Act. No. 17, 1917 La. Acts 26.

283. The other vicious circles on immovables are (i) the widow primes general privileges, which prime conventional mortgages, which prime the widow; and (ii) the widow primes judicial mortgages, which prime a subsequently recorded conventional mortgage, which primes the widow. Putting these two together yields a vicious circle with four participants: widow primes general privileges, which prime judicial mortgages, which prime a subsequently arising conventional mortgage, which primes the widow. By 1932, the Supreme Court seemed to have lost its desire to interpret the law in order to avoid vicious circles. In *Morelock v. Morgan & Bird Gravel Co.*, 141 So. 368 (La. 1932), the Court was faced with the problem of ranking the vendor's privilege on movables against a privilege created under the corporate receiver statute in favor of those creditors lending money to the receiver. The receiver's certificates evidencing these loans were given a privilege over all other creditors of the corporation "save the vendor's lien and privilege." *Id.* at 372. Citing *Cooley*, the Court originally ruled that the vendor's privilege in question was limited to that on immovables. *Id.* On rehearing, the Court held that this exception applied to the vendor's privilege on both movable and immovable property, notwithstanding arguments that the holding would create the possibility of a conflict among the holders of the receiver's certificates, the lessor and the vendor. *Id.*

284. See LA. REV. STAT. ANN. §§ 9:4501, 4502 (2007).

285. Since the repairman's statute is newer legislation, Professor Dainow concludes that the proper ranking is (1) vendor's privilege, (2) mechanic's privilege, and (3) lessor's privilege. See Dainow, *supra* note 271, at 6-7.

C. Repairman/Unperfected Security Interest/Vendor

As mentioned above, the adoption of the Uniform Commercial Code eliminated a common vicious circle involving chattel mortgages, but it also created at least one new vicious circle. When the Uniform Commercial Code was enacted, the statute creating the repairman's privilege was amended to provide that the repairman's privilege is subject to previously *perfected* security interests.²⁸⁶ This created a new vicious circle where an unperfected security interest is involved. Suppose that a debtor has granted a security interest in all of his present and future equipment, and this security interest is not properly perfected. He purchases an item of equipment on credit from a vendor who does not obtain a consensual security interest and therefore holds only a vendor's privilege. The debtor then causes the equipment to be repaired by the repairman. Under the repairman's statute, the repairman would have priority over the secured party, because the secured party does not have a previously perfected security interest. The secured party, even though his security interest is unperfected, would have priority over the vendor.²⁸⁷ But, the vendor would have priority over the repairman by the express command of the repairman's statute.²⁸⁸

D. Vendor/Widow/Repairman/Lessor

In a four-way contest among the widow, the vendor, the lessor, and the repairman, the vendor can claim priority over both the repairman and the widow, for the reasons mentioned above. By operation of the repairman's statute, the repairman is inferior to the vendor but can claim priority over the widow and the lessor.²⁸⁹ Under article 3252, the widow is superior to all but the vendor. The

286. See Act No. 137, 1989 La. Acts 527, amending LA. REV. STAT. ANN. §§ 9:4501, 4502 (2007).

287. See *supra* note 274.

288. Using Professor Dainow's solution of following the latest enacted legislation, the provisions of section 9-322(h) of the Louisiana Uniform Commercial Code (last amended in 2001), must be given full effect notwithstanding any earlier legislation. Thus, the repairman must outrank the unperfected security interest, since that is the result which section 9-322(h) ordains, even though it does not provide that result directly within its own provisions. In addition, section 9-322(h) requires that the unperfected security interest outrank the vendor. Therefore, the priority would appear to be: (1) repairman; (2) unperfected security interest; and (3) vendor. For a four-way variation on this problem, adding the involvement of a lessor's privilege, see RUBIN, *supra* note 82, § 32.2, at 226.

289. See LA. REV. STAT. ANN. §§ 9:4501, 4502 (2007).

lessor can claim preference over the vendor by operation of article 3263.²⁹⁰

E. Vendor/Funeral Charges/Lessor

Professor Dainow identifies one vicious circle arising under the *unamended* Civil Code itself.²⁹¹ Under article 3257, the general privilege for funeral charges primes the lessor. Under article 3263, the lessor primes the vendor, but the vendor's privilege primes the privilege for funeral charges. Professor Dainow argues that there was no intent to create a vicious circle in this instance but rather simply an express subordination of the lessor's privilege to the general privilege for funeral charges. Thus, he concludes that the proper ranking is the vendor's privilege, the privilege for funeral charges, and the lessor's privilege.

Professor Dainow observes that the lessor once had one of the most favored privileges, but later legislation seems to have consistently preferred the vendor, but not the lessor, over special statutory privileges, while leaving intact the ranking rule under the Civil Code preferring the lessor over the vendor.²⁹² We have gone even further in this evolution in recent years, since the doctrinal basis for the superiority of the lessor's privilege has been removed, though the lessor's privilege nonetheless remains superior to that of the vendor.²⁹³ More importantly, the privileges of both the lessor and the vendor upon movables, each of which under former law primed later-arising chattel mortgages,²⁹⁴ have seen their ranking, and therefore their overall importance, greatly reduced by the adoption of the Uniform Commercial Code. Under its provisions, both of these privileges rank behind all Chapter 9 security interests, irrespective of the order in which the competing rights arise and apparently irrespective of whether the security interest is even perfected.²⁹⁵ Whatever it might once have meant, the idea of

290. Professor Dainow concludes that the repairman's statute, as the latest enacted legislation, governs, with the result that priority is (1) vendor's privilege, (2) mechanic's privilege, (3) widow's privilege, and (4) lessor's privilege. *See* Dainow, *supra* note 271, at 8.

291. *Id.*

292. *Id.* at 8 n.38.

293. *See supra* note 265.

294. *See* LA. REV. STAT. ANN. § 9:5354 (repealed by Act No. 128, 2001 La. Acts 206).

295. *See* UCC § 9-322(h) (2010); LA. REV. STAT. ANN § 10:9-322(a) (Supp. 2015). *See generally* James A. Stuckey, *Louisiana's Non-Uniform Variations in U.C.C. Chapter 9*, 62 LA. L. REV. 793, 844-46 (2002).

adheret visceribus rei has itself been eviscerated, at least insofar as the vendor's privilege on movables is concerned.

X. RANKING OF THE VENDOR'S PRIVILEGES ON IMMOVABLES

The Civil Code lists very few special privileges on immovables; chief among them are that of the vendor and those in favor of contractors, subcontractors, laborers, materialmen, and others supplying goods, labor, and services in constructing, rebuilding, or repairing buildings or other work.²⁹⁶ The latter category of special privileges has been effectively supplanted by the Louisiana Private Works Act.²⁹⁷ The following discussion addresses the ranking of a timely filed vendor's privilege on an immovable against the general privileges arising under the Civil Code, its ranking against previously filed general mortgages, the ranking of vendor's privileges held by building and loan associations, the ranking of a vendor's privilege that is not filed in a timely manner, and the ranking of a vendor's privilege against privileges arising under the Private Works Act.

A. Ranking of a Vendor's Privilege Against General Privileges

The first few words contained in article 3267 of the Civil Code give the impression that the article is designed to rank the vendor's privilege on movables against other privileges:

If the *movables* of the debtor are subject to the vendor's privilege, or if there be a house or other work subjected to the privilege of the workmen who have constructed or repaired it, or of the individuals who furnished the materials, the vendor, workmen and furnishers of materials, shall be paid from the price of the object affected in their favor, in preference to other privileged debts of the debtor, even funeral charges, except the charges for affixing seals, making inventories, and others which may have been necessary to procure the sale of the thing.²⁹⁸

296. LA. CIV. CODE arts. 2772, 3249 (2015).

297. LA. REV. STAT. ANN. § 9:4801 (2007). *See* Robertshaw Controls Co. v. Pre-Eng'd Prods., Co., 669 F.2d 298 (5th Cir. 1982) (holding that based upon language of exclusivity found in Act No. 298, § 12, 1926 La. Acts 540, that the enactment of the predecessor to the Private Works Act in 1926 was intended to cover the whole subject matter and thus repealed Louisiana Civil Code article 2772 by implication). *See also* VETTER & HARRELL, *supra* note 14, at 245–46.

298. LA. CIV. CODE art. 3267 (2015) (emphasis added).

However, when the entire article is read, it is readily apparent that the word “movables” at the beginning of the article must mean “immovables.” If the article were applied as written, then the vendor’s privilege on movables would be ranked quite unnecessarily against general privileges on immovables.²⁹⁹ This article was not borrowed from the *Code Napoléon*, and for that reason, the error cannot be attributed to a fault in translation.³⁰⁰ If this error is corrected in the interpretation of the article, its meaning is that special privileges on immovables, including the vendor’s privilege, outrank general privileges other than those for fixing seals, making inventories and law charges for things necessary to procure the sale of the thing subject to the special privilege.³⁰¹

299. Professor Dainow wrote an entire article dedicated solely to the proof that the word *movables* in Article 3267 should be *immovables*. See Joseph Dainow, *Art. 3267 and the Ranking of Privileges*, 9 LA. L. REV. 370 (1949). He observes that, at the time of his writing, there was not a single decision predicated upon the application of the article to a vendor’s privilege on movables. No such case appears to have arisen in the five and a half decades since the time of his writing.

300. Both the French and English versions of the 1825 Code, which introduced the article, contained the same error. The English version of the article also contains an unrelated, though perhaps benign, error in translation from the French version of the 1825 Code: “privileged debts” should be “privileged creditors.” The words “*créanciers privilégiés*” were used in the French version of the 1825 Code.

301. See *Salaun v. Their Creditors (In re Contonio)*, 30 So. 696 (La. 1901); *Marcelin v. His Creditors*, 21 La. Ann. 423 (1869); *Monrose v. His Creditors*, 2 Rob. (La.) 280 (1842). In *Marsh v. His Creditors*, 11 La. Ann. 469 (1856), the Court explained that the charges superior to the vendor’s privilege should be restricted to those charges without which the sale could not have taken place (and in that case, it was conceded that the sheriff’s, clerk’s, notaries’ and appraiser’s fees were necessary charges in procuring the sale), but following *Monrose*, the Court also held that the syndic’s commission upon the property sold was an expense of administration inuring to the benefit of the vendor and therefore priming the vendor’s privilege. In *Succession of Lauve*, 18 La. Ann. 721 (1866), the Court observed that, even though succession charges inuring to the benefit of all parties concerned are of higher dignity than debts of the deceased, article 3234 of the 1825 Code (article 3267 of the 1870 Code) is an exception to this rule, and the holder of the vendor’s privilege cannot therefore be charged with general privileges or succession charges. A more recent claim of priority under article 3267 over a vendor’s privilege appeared in *Norvell v. Crichton*, 150 So. 2d 621 (La. Ct. App. 1963), in which, following the credit sale of an immovable, the buyer’s attorney exerted efforts to have the property declared the buyer’s separate property. Finding that this attorney’s services were not rendered “to procure the sale of the thing” within the meaning of article 3267, the court held that his privilege for his fees was subordinate to the vendor’s privilege. *Id.* at 623.

B. Ranking of a Vendor's Privilege Against Previously Filed General Mortgages

*Pedesclaux v. Legare*³⁰² is an illustration of the preference of a timely filed vendor's privilege over a previously recorded general mortgage. That case involved a contest between a wife's legal mortgage upon her husband's property and a vendor's privilege arising out of his subsequent purchase of an immovable. Curiously, both counsel argued the case on the basis of the supposition that the law in force in April 1869, when the vendor's privilege arose, required recordation of the vendor's privilege on the very day of the passage of the act. However, that law did not come in force until the adoption of the 1870 Code a year later. Article 3240 of the 1825 Civil Code had imposed a time limitation for recordation of a vendor's privilege, but an 1868 statute removed the time limitation altogether. Thus, the Court held that the vendor's privilege, by its very nature alone and irrespective of the time of its recordation, outranked the legal mortgage.³⁰³

Gallaugh v. Hebrew Congregation involved a contest between the holder of a judicial mortgage and a third person who had purchased an immovable from the judgment debtor.³⁰⁴ Under the facts of the case, the judicial mortgage was recorded long before the judgment debtor acquired the immovable in question and even longer before he sold it to the third person.³⁰⁵ However, the act of credit sale by which the judgment debtor acquired the property was not recorded until three days *after* recordation of the judgment debtor's sale of the property to the third person.³⁰⁶ The third person cleverly contended that the judicial mortgage never attached to the immovable, on the theory that a judicial mortgage cannot attach until the judgment debtor's title has been recorded and in this case, by the time the judgment debtor's title was recorded, he had already alienated the property in favor of the third person.³⁰⁷ Rejecting this contention, the Court held that the Civil Code provides that no act affecting immovable property shall have any

302. 32 La. Ann. 380 (1880).

303. *Id.* The Court observed that, even if it were to apply the period that had applied under article 3240 of the 1825 Code before the 1868 amendment, the same result would obtain, since the vendor's privilege was recorded in a seasonable manner based upon the time originally given for recordation under the 1825 Code. *Id.*

304. *Gallaugh v. Hebrew Congregation*, 35 La. Ann. 829 (1883).

305. *Id.*

306. *Id.* at 830.

307. *Id.*

effect *against* third parties until deposited for registry.³⁰⁸ The law requiring registry is intended to protect the vendor's creditors and other third persons who do not know of the existence of an unrecorded transfer; it was never designed to prevent property from passing from vendor to purchaser or to prevent general mortgages from reaching and encumbering immovables acquired under an unrecorded title. Thus, judicial and legal mortgages recorded against the purchaser encumber immovables from the very instant of purchase whether the title is recorded or not but rank subordinate to encumbrances existing on the property *against the vendor* at the moment of transfer.³⁰⁹

A sequel to *Gallaughier, Givanovitch v. Hebrew Congregation*,³¹⁰ arose from the same set of facts and addressed the issue of whether the privilege of the unpaid vendor under the late-filed act of credit sale had priority over the pre-existing judicial mortgage against his purchaser. In holding the vendor's privilege to be inferior, the Court followed previous authorities to the effect that previously recorded general mortgages will take precedence over a vendor's privilege unless the contract from which the vendor's privilege arises is seasonably recorded in the mortgage records.³¹¹ The reverse set of circumstances involving a timely filed vendor's privilege was presented in the much more recent case of *Lawyers Title Insurance Corp. v. Valteau*,³¹² which is discussed more fully in the following section of this Article. In that case, the Supreme Court reaffirmed the principle that a timely filed vendor's privilege outranks a previously recorded judicial mortgage *against the vendee*.³¹³

308. LA. CIV. CODE art. 2264 (1870). See also LA. CIV. CODE art. 1839 (2015).

309. To the extent the Court's prior holding in *Rochereau v. Colomb*, 27 La. Ann. 337 (1875), implied to the contrary, it was expressly overruled. *Gallaughier*, 35 La. Ann. at 832.

310. 36 La. Ann. 272 (1884).

311. In *Ridings v. Johnson*, 128 U.S. 212 (1888), the United States Supreme Court considered the issue of whether a vendor's privilege recorded several years after the date of the sale, but simultaneously with the recordation of the contract of sale, granted the vendor a privilege. Citing both *Gallaughier* and *Givanovitch*, the Court held that even though the unrecorded act of sale passed title to the vendee such that he had the power to grant mortgages upon it, the vendor's privilege had no priority over mortgages granted by the vendee in the interim where the vendor's privilege was not recorded within the period of time required by article 3274. *Id.* at 223–24. For a more recent case holding that a vendor's privilege that is not timely recorded does not outrank a previously existing judicial mortgage, see *Commissioner of Insurance v. Terrell*, 647 So. 2d 445 (La. Ct. App. 1994).

312. 558 So. 2d 1319 (La. Ct. App. 1990).

313. *Lawyers Title Ins. Corp. v. Valteau*, 563 So. 2d 260 (La. 1990). Following *Lawyers Title Insurance Corp.*, the court in *Verret v. Rougeau*

Planiol enunciates essentially the same conclusion that the Supreme Court reached in *Valteau*:

Because of its nature, the privilege necessarily ranks all mortgages established on the same immovable, although anterior to it. This is what Art. 2095 provides: "The privilege is the right to be preferred to the other creditors, even mortgages." It is clear that a privileged creditor cannot acquire on the property which is subject to it, a mortgage which will rank those which already exist on his own account or on account of his authors; the debtor, who sells his property and becomes privileged as a vendor, is necessarily primed by his own creditors. A vendor can prime only the creditors who acquire mortgages against the purchaser: they are like him creditors of such purchaser, and they will be paid proportionately if no cause of preference intervenes.³¹⁴

...
The vendor, creditor of the price, conflicts not only with the creditors of the buyer who will in the future obtain mortgages but also with creditors having pre-existing general mortgages. . . . The latter will have a mortgage on the immovable on the very day of the purchase. On the property sold their mortgage right is therefore of the same rank as the right of the vendor. The vendor is nevertheless preferred over such prior creditors because he is "privileged." Such was already the language of Pothier: . . . he who has sold the heritage should be preferred to all the other creditors, for as this owner has acquired the heritage with the charge of the mortgage which his vendor has reserved on it in alienating it, he cannot mortgage it to his other creditors except subject to the charge of this mortgage, not being able to transfer to them a greater right than he had on it himself.³¹⁵

applied the rule that a vendor's privilege outranks a prior recorded judicial mortgage against the vendee. *See Verret v. Rougeau*, 579 So. 2d 1239 (La. Ct. App. 1991).

314. PLANIOL & RIPERT, *supra* note 10, No. 3139, at 700.

315. *Id.* No. 3140, at 700–01. *See also* RUBIN, *supra* note 82, § 33.3(c), at 282.

*C. Ranking of a Vendor's Privilege in Favor of Building and Loan Associations*³¹⁶

Over the course of time, building and loan associations developed the use of a sale/resale procedure to create a vendor's privilege even in those cases in which a sale was not otherwise involved.³¹⁷ This practice was made possible by the enactment of legislation in 1888 providing that "in case any such association shall purchase property from any person and shall afterwards sell the same property to the same person, then such association shall have the vendor's lien and privilege upon the property so sold."³¹⁸ As the Supreme Court later explained, this enactment was necessary in order to overcome prior jurisprudence that a transaction by which a borrower made a cash sale of his property to a lender, which then immediately resold the same property to the borrower on terms of credit, was a mere pignorative contract that did not create a vendor's privilege.³¹⁹ The policy reasons motivating this favored treatment for building and loan associations have been explained in the following terms:

The purpose for which building and loan associations are established is to enable persons of small means and limited incomes to acquire homes and thus become better citizens and more identified with the welfare and growth of the community. Because of the advantageous results attending the operation of such associations and their beneficent [sic] purpose, they have been favored and granted special privileges by various state Legislatures. Our own Legislature has deemed it to be in the interest of our people to encourage the formation and operation of building and loan associations, and has enacted special laws giving them

316. This section draws upon, and to a large extent reproduces, the author's work embodied in the November 2014 Report of the Louisiana State Law Institute to the Louisiana Legislature in Response to House Concurrent Resolution No. 15 of 2011 Relative to Purchase Money Mortgages, which was authored by the author of this Article with the assistance of members of the Security Devices Committee of the Louisiana State Law Institute. This Report is on file with the Louisiana State Law Institute.

317. Under this practice, the borrower, already the owner of the immovable, would sell it to the building and loan association, which then resold the property back to the borrower, reserving both the vendor's privilege provided by law and a conventional mortgage upon the immovable.

318. Act No. 115, § 4, 1888 La. Acts 177.

319. *Capillon v. Chambliss*, 29 So. 2d 171, 175-76 (1946).

certain well-defined powers and privileges to be exercised in the promotion of their objects.³²⁰

This legislation spawned a considerable amount of litigation in which the courts were called upon to determine the extent to which these sale/resale transactions would be treated as true sales.³²¹

In 1902, the Legislature reinforced the 1888 legislation, providing “that every loan [made by a building and loan association] on real estate shall be secured by vendor’s privilege and first mortgage upon real property.”³²² This enactment not only made the vendor’s privilege mandatory, but it introduced into the law a certain ambiguity, for the act provided that “[s]uch vendor’s privilege and mortgage shall have priority over all other liens, charges, privileges, incumbrances [sic] and mortgages . . . which shall be recorded or claimed *subsequent* to the recording of such vendor’s privilege and mortgage.”³²³ The 1902 Act then repeated the provisions of the 1888 legislation that allowed associations to enter into sale/resale transactions, stating that in such cases “such association shall have a privilege of equal rank as the vendor’s lien and privilege upon the property so acquired.”³²⁴ There is obvious tension between these two provisions, for a true vendor’s privilege outranks even pre-existing mortgages, as discussed in the preceding section of this Article. This tension persists in the law today. One paragraph

320. *Mayre v. Pierson*, 133 So. 163, 165 (La. 1931).

321. *See, e.g.*, *Am. Homestead Co. v. Karstendiek*, 35 So. 964, 966–67 (La. 1903) (observing that a sale and resale involving a building and loan association is a valid sale creating a vendor’s privilege in favor of the association); *Hutts v. Crowley Bldg. & Loan Ass’n*, 83 So. 417, 418 (La. 1919) (noting that a sale of community property to an association followed by a resale to the husband after the wife’s death did not vest any interest in the property in the deceased wife’s heirs); *George P. Caire v. Mut. Bldg. & Loan Ass’n*, 1 Pelt. 166, 168 (La. Ct. App. 1918) (hurricane damage occurring while title was vested in the association was borne by the association). *But see Capillon*, 29 So. 2d at 176 (holding that sale of wife’s separate property to the association followed by resale did not change the character of the property from separate to community, because the transaction is merely a pignorative contract designed to secure, by means of a vendor’s privilege, the loan made by the building and loan association to the mortgagor). *Ruffino v. Hunt*, 99 So. 2d 34 (La. 1958), applied this rule to a sale–resale transaction entered into by a husband, irrespective of the absence of a declaration of separateness in the act of reconveyance from the building and loan association, declining to distinguish *Mayre* on the ground that it had involved the sale by a married woman of her separate property to a building and loan association. *See also Fontenot v. Fontenot*, 339 So. 2d 897 (La. Ct. App. 1976); *Feinhals v. Campbell*, 145 So. 2d 622 (La. Ct. App. 1962); *Lazaro v. Lazaro*, 92 So. 2d 402 (La. Ct. App. 1957).

322. Act No. 120, 1902 La. Acts 156.

323. *Id.* at 198 (emphasis added).

324. *Id.*

of Louisiana Revised Statutes section 6:830 authorizes building and loan associations to enter into sale/resale transactions and provides that such a transaction is treated as a purchase and sale vesting in the association a privilege of equal rank with the vendor of immovable property.³²⁵ Another paragraph in the same statute provides that all mortgages in favor of building and loan associations “shall have a rank equal to that of a vendor’s privilege . . . and shall have priority over all other liens, privileges, encumbrances, and mortgages . . . which are recorded or arise in any manner subsequent to the date of recordation of the mortgage in favor of the association.”³²⁶

Surprisingly, the courts have only rarely addressed the priority of a vendor’s privilege held by a building and loan association. In one early case, the Court held that a timely filed vendor’s privilege arising in favor of an association from a sale/resale transaction primed a conventional mortgage executed at the same time in favor of another creditor.³²⁷ The issue of whether a timely recorded vendor’s privilege in favor of a building and loan association outranks a pre-existing judicial mortgage against the association’s borrower was addressed by the Louisiana Fourth Circuit Court of Appeal in *Homes Savings & Loan Ass’n v. Tri-Parish Ventures*.³²⁸ Significantly, the building and loan association in this case was not a seller under a sale/resale transaction but instead claimed the ranking of a vendor’s privilege on the basis of Louisiana Revised Statutes section 6:830(H). The association’s mortgage was in competition with a judicial mortgage that had been filed against the association’s borrower *before* the borrower acquired the property and mortgaged it to the building and loan association. Citing Civil Code article 3273 to the effect that privileges are effective against third persons from the date of recordation, the court held that article 3274 is simply a limited exception to this rule, “in which a grace period is given to the privilege holder over *intervening* mortgages only, where the act importing privilege is recorded within a very limited period after the date of execution.”³²⁹ The court observed that a similar grace period was created for mortgages in favor of building and loan associations pursuant to the savings and loan association law; “however, the special ranking date, as in Louisiana Civil Code article 3274, affects intervening mortgages only.”³³⁰ Later the court

325. LA. REV. STAT. ANN. § 6:830(D)(2) (2005).

326. *Id.* § 6:830(H).

327. *Union Homestead Ass’n v. Fink*, 156 So. 458, 460 (La. 1934).

328. 505 So. 2d 165 (La. Ct. App. 1987).

329. *Id.* at 167.

330. *Id.*

remarked that “[a] vendor’s privilege which is preserved and perfected against third parties through recordation primes subsequent mortgages affecting the property.”³³¹ The court thus found that the holder of the previously filed judicial mortgage had priority. What is surprising about the court’s holding is that it did not seem to be based upon an interpretation of Louisiana Revised Statutes section 6:830 but rather upon an interpretation of those articles of the Civil Code applicable to all vendor’s privileges.³³²

This rationale was called into question in *Lawyer’s Title Insurance Corp. v. Valteau*,³³³ in which the court was faced with a true credit sale in favor of purchaser against whom a judicial mortgage had been recorded five years earlier. No building and loan association was involved. In affirming a finding by the trial court that the vendor’s privilege outranked the previously recorded judicial mortgage against the purchaser, the Fourth Circuit went to great lengths to explain its prior opinion in the *Home Savings* case, maintaining that the building and loan association in that case was never a vendor and that Louisiana Revised Statutes section 6:830(H) does not actually afford building and loan associations a vendor’s privilege that outranks pre-existing interests.³³⁴ The Fourth Circuit in *Valteau* further explained that its holding in *Home Savings* was that mortgages and other encumbrances *emanating from the vendee* are primed by the vendor’s privilege even when recorded before a credit sale is consummated.³³⁵ In its opinion denying a writ application in *Valteau*, the Supreme Court limited the holding of the case to a mere statement that a vendor’s privilege arising from a sale to a vendee outranks a prior recorded judicial mortgage *against the vendee*.³³⁶ The Supreme Court explained that the decision in *Home Savings* involved a situation in which a judgment debtor already owned the property *before* mortgaging it to the building and loan association in a refinancing transaction.³³⁷ For that reason, the prior recorded judicial mortgage against that judgment debtor outranked any vendor’s privilege arising from his mortgage of the property in

331. *Id.*

332. *See also* Pelican Homestead & Sav. Ass’n v. Royal Scott Apartments P’ship, 541 So. 2d 943, 946 (La. Ct. App. 1989) (citing *Home Savings*, 505 So. 2d at 167, for the proposition that a vendor’s privilege in favor of a building and loan association under section 6:833(H)(1) has priority over only those privileges and encumbrances that are recorded subsequent to the date of recordation of the mortgage in favor of the building and loan association).

333. 558 So. 2d 1319 (La. Ct. App. 1990).

334. *Id.* at 1320–21.

335. *Id.* at 1322.

336. *Lawyer’s Title Ins. Corp. v. Valteau*, 563 So. 2d 260 (La. 1990).

337. *Id.* at 261.

favor of the building and loan association.³³⁸ Nonetheless, the Supreme Court found that the Fourth Circuit's observations concerning the nature and effect of the vendor's privilege granted to building and loan associations under Louisiana Revised Statutes section 6:830H were "clearly dicta" since there was no building and loan association involved in *Valteau*.³³⁹

The courts have not since been called upon to determine whether, in the absence of a sale/resale transaction, Louisiana Revised Statutes section 6:830 grants a building and loan association mortgage the ranking of a true vendor's privilege that outranks pre-existing mortgages or whether, as the statute itself provides, this statutory vendor's privilege outranks only later arising encumbrances. One Louisiana treatise argues persuasively that Louisiana Revised Statutes section 6:830 cannot be construed to grant a building and loan association's mortgage priority over a pre-existing mortgage in the absence of an actual sale, for that interpretation would grant the association priority any time it lent money.³⁴⁰ It seems to be a fair inference from the jurisprudence that, if a building and loan association enters into an actual sale/resale transaction, it enjoys a true vendor's privilege that, upon timely recordation, will outrank any mortgage bearing against the vendee other than mortgages that burdened the property at the time it was conveyed to the association.³⁴¹ If, on the other hand, the building and loan association merely obtains a mortgage on the property without actually participating in the transaction as a vendor, its "vendor's privilege" should outrank only later arising encumbrances.

338. *Id.*

339. *Id.*

340. TITLE, *supra* note 85, § 15:7, at 1315–18.

341. With true sale and resale transactions, there are two different factual circumstances leading to wholly different results. If the property is burdened by a judicial mortgage before it is ever sold to the building and loan association, the association's vendor's privilege, even if timely filed, will not outrank the previously filed judicial mortgage. This occurs, for instance, when a borrower whose title to property is subject to a judicial mortgage sells the property to a building and loan association that then immediately re-sells the property to the borrower. If, on the other hand, the association acquires unencumbered title to the property from a seller who is not its borrower, and then immediately sells the property to its borrower, at which time a judicial mortgage previously filed against the borrower attaches, the building and loan association's vendor's privilege, if timely filed, will outrank the previously filed judicial mortgage against the borrower. These outcomes are not the result of any special legislation affecting building and loan associations; they result from the general rules applicable to vendor's privileges as interpreted in the cases discussed above.

D. Ranking of Vendor's Privileges That Are Not Timely Filed

Article 2113 of the *Code Napoléon* provides that all privileges which are required to be inscribed and as to which the conditions required to preserve the privilege have not been fulfilled do not cease to operate as mortgages, but the mortgage has effect as to third persons only from the time of the inscription. As Planiol explains,³⁴² if a privileged creditor fails to inscribe his privilege within the time required by law, he does not lose his right to inscribe. The privilege can still be inscribed after the delay has elapsed, but its rank is diminished: Its ranking ceases to be regulated under the law as a privilege but instead depends upon the date of its inscription. Thus, if the inscription is made after the expiration of the delay given for recordation, the privilege as such is lost, and it “degenerates” into nothing more than an ordinary mortgage which is assigned its rank according to usual rules based upon the date of recordation.³⁴³ These concepts appeared in the 1825 Louisiana Civil Code,³⁴⁴ and their application is illustrated by *Succession of O’Laughlin*.³⁴⁵ In that case, the curator of a succession proposed to allocate the general law charges of the succession proportionately to two separate immovables, both of which were subject to untimely filed vendor’s privileges. Because the vendor’s privileges were not inscribed in a timely manner, their character as privileges had been lost, and the creditors were entitled only to the rights of mortgagees, with the result that one or both of them had to contribute to the payment of general privileges.³⁴⁶

342. PLANIOL & RIPERT, *supra* note 10, Nos. 3149–3150.

343. See CODE CIVIL [C. CIV.] art. 2379 (Fr.) (formerly article 2113). Interestingly, a vendor’s privilege could not originally degenerate into a mere mortgage because the French Civil Code did not at first prescribe a time during which its inscription was required. XIV BEUDANT ET AL., *supra* note 18, § 706. Currently, however, inscription of a vendor’s privilege is required within two months from the act of sale under French Civil Code art. 2108. CODE CIVIL [C. CIV.] art. 2379 (Fr.) (formerly article 2108).

344. LA. CIV. CODE arts. 3240–3241 (1825).

345. 18 La. Ann. 142 (1866).

346. The Court then addressed the issue of which of the two mortgages in question, bearing upon different immovables, had to bear the loss. *Id.* at 143–44. To answer this question, the Court turned to articles 3236 and 3277 of the 1825 Code (substantially the same as the 1870 civil code articles 3269 and 3270). *Id.* at 143. The former article provides that if general privileges cannot be satisfied out of the movables, they are paid in preference to all mortgages and privileges other than special privileges in favor of the vendor and the workmen and furnisher of materials. The resulting loss falls upon the creditor whose mortgage is “the least ancient.” The Court found it significant that the former article makes no reference to the dignity of mortgages, but only to their dates. *Id.* at 144. Thus, the Court rejected the argument that the reference to different

The rules governing the effect of the untimely reinscription of a privilege were dramatically changed in the 1870 Code. Article 3274 suppressed the “degeneration” concept, providing instead that an untimely inscribed privilege affords no preference over creditors who have previously acquired mortgages. In other words, the creditor in question still holds a privilege, but that privilege is robbed of its priority over mortgages that were recorded prior to the date the privilege was recorded. This is not a distinction without a difference, for the vendor’s privilege on immovables enjoys favored treatment over general privileges.

The Court in *Wheelright v. St. Louis, N.O. & O. Canal Transportation Co.*³⁴⁷ seized upon the opportunity to explain the effect of the adoption of article 3274 of the 1870 Code. Under the facts of the case, the privileged creditor, who apparently claimed a mechanic’s privilege on an immovable, filed an affidavit of his privilege long after the registry of the plaintiff’s mortgage and after expiration of the time limitation for filing his privilege provided under article 3274.³⁴⁸ The Court examined differences existing between the 1825 and 1870 Codes.³⁴⁹ Under the 1825 Code,³⁵⁰ a privilege was valid against third persons from the *date of the act* if recorded within a specified period of time. If not recorded within that time, it lost its effect as a privilege; that is to say, it conferred no preference over a creditor who had acquired a mortgage in the meantime. However, it was

mortgages according to their dates must be taken to refer to different mortgages bearing upon the same thing. *Id.* Accordingly, the Court held that the later of the two mortgages had to contribute to the payment of the general privileges, and the earlier of the two was required to contribute only to the charges necessary to procure the sale of the property subject to the mortgage. *Id.* at 144–45. The result of the case would likely be different under the 1870 Code, since article 3274 now provides that untimely inscribed vendor’s privileges do not lose their character as privileges and article 3269 takes specific exception to special privileges in favor of a vendor. *See* discussion *supra* Part VIII.D.

347. 17 So. 133 (La. 1895).

348. *Id.* at 137.

349. There was another change that the Court did not note: The statement in article 3240 of the 1825 Code that privileges are valid against third persons from the date of the act, assuming timely recordation, was suppressed in favor of a provision that privileges are not effective against third persons unless recorded. *See* discussion *supra* Part VIII.E (concerning the ranking of vendor’s privileges against Private Works Act privileges). Interestingly, the entire discussion by the Court in *Wheelwright* was dicta, because it held that the filing made by the purported privileged creditor was defective since it did not show the creditor’s claim on its face but rather made reference to documents to be found elsewhere.

350. LA. CIV. CODE arts. 3240–3241 (1825).

still valid as a mortgage.³⁵¹ Under the 1870 Code, article 3273 provides that privileges are valid against third persons from the *date of the recording* of the act of evidence of the indebtedness. Article 3274 provides that no privilege affects third persons unless recorded in the manner required by law and that no privilege confers a preference on the creditor who holds it against other creditors who have acquired a mortgage unless that act is recorded within a specified delay after the contract is entered into.³⁵² The Court in *Wheelwright* explained the difference between the 1825 Code and the 1870 Code as follows: under the 1825 Code, tardiness of inscription reduced the privilege forever to a mere mortgage.³⁵³ Under the 1870 Code, the character of the tardily inscribed privilege is not changed; however, its effect as a privilege, *as to mortgagees only*, is lost. As to other parties, the privilege retains its full effect.³⁵⁴

351. These concepts appear consistent with Planiol's discussion concerning the "degeneration" of an untimely filed privilege into a mortgage.

352. Under the 1870 Code as originally written, the act of sale had to be recorded on the very day that it was adopted. By an amendment in 1877, the present delays of 7 and 15 days were inserted. *See* Act No. 45, 1877 La. Acts 59.

353. In support of this proposition, the Court cited *Succession of O'Laughlin* and article 2095 of the French Civil Code. *See Wheelwright*, 17 So. at 138.

354. The holding of *Wheelwright* to the effect that the untimely inscription of a privilege does not cause it to lose its character as a privilege calls into question the Court's earlier decision in *Succession of Marc*, 29 La. Ann. 412 (1877), which, like *Wheelwright*, purported to explain the differences between the 1825 and 1870 Codes. In *Succession of Marc*, the estate consisted of two immovables, one of which was subject to a mortgage in favor of Soye and the other of which was subject to a later arising and untimely filed vendor's privilege in favor of Gayarre. *Id.* Both immovables were sold, and the issue was which of the two creditors had to bear the widow's privilege and the general privileges. *Id.* On original hearing, the Court held that the widow's privilege had to be paid with the funds derived from the sale of the immovable subject to the Soye mortgage, since the widow's privilege is inferior to the vendor's privilege. *Id.* at 414–15. All general privileges were assessed against the fund derived from the sale of the Gayarre property, since that mortgage was the least ancient of the two. *Id.* On rehearing, however, the Court reassigned the widow's privilege to the Gayarre fund in light of a "radical change" of two articles of the Civil Code. *Id.* at 415. Under the 1825 Code, the vendor had six days within which to record his privilege. However, under the 1870 Code as originally adopted, as against previously recorded mortgages, the vendor's privilege had effect as such only when recorded on the very day of the contract creating it. Thus, the Court held that Gayarre had "no privilege whatever, as against third persons" since his vendor's privilege was not recorded on the day the sale was made. *Id.* at 416. Gayarre's mortgage, however, was not lost, but since Gayarre's mortgage was the least ancient of the two, the Gayarre fund had to contribute to the widow's privilege before the Soye fund. *Id.* This case appears to represent a classic application of Planiol's "degeneration" concept, which the *Wheelwright* court would later reject. However, the holding of the case might nonetheless still be correct if article 3274 is applied not just as a ranking rule when a privilege and

Another interesting issue that arises when the vendor fails to record his privilege in a timely fashion is whether the vendor's exercise of his right of dissolution for non-payment of the purchase price will nonetheless cause title to the property to revert to the vendor free of a judicial mortgage or other general mortgage affecting the vendee. At least one case holds that, upon exercise of the right of dissolution, title is returned to the vendor unencumbered by a previously filed general mortgage; however, the case does not expressly mention whether the vendor's privilege was recorded at all.³⁵⁵ In view of the well-established rules that the privilege and the right to dissolve are entirely independent rights and that the effect of the exercise of the right to dissolve is to return the property to the vendor free of encumbrances placed on it by the vendee,³⁵⁶ the vendor's failure to record his privilege in a timely manner, or to record it at all, should not alter the result.

E. Ranking of a Timely Filed Vendor's Privilege Against Private Works Act Privileges

The Civil Code does not purport to rank the vendor's privilege on an immovable against the special privileges provided by the Civil Code in favor of those involved in performing work on the immovable. Instead, it provides for a separate appraisal procedure.³⁵⁷ In the 1871 case of *City of Baltimore v. Parlange*,³⁵⁸ the Court observed that this separate appraisal procedure "exemplifies the intelligent sense of justice which distinguishes the civil law."³⁵⁹ The rationale for the separate appraisal procedure

mortgage exist on the same immovable but instead is given a more expansive effect to allow a mortgage holder to ignore entirely the status of a privilege as a privilege when it is not filed in a timely manner. In other words, even though the untimely filed vendor's privilege would still count as a privilege insofar as the widow was concerned, it would not be a privilege—for any purpose—insofar as the creditor holding a mortgage on another immovable is concerned. Thus, the other mortgagee could force the unpaid vendor to share in the payment of general privileges under articles 3269 and 3270 as though the unpaid vendor held merely an ordinary mortgage. This argument may stretch article 3274 beyond its plain meaning: The article does not provide that an unseasonably filed privilege is wholly without effect as a privilege as regards mortgagees, but rather provides simply that an unseasonably filed privilege "confers no preference" on the creditor who holds it against mortgagees.

355. *Adler v. Adler*, 52 So. 668 (La. 1910).

356. *See* discussion *supra*.

357. LA. CIV. CODE art. 3268 (2015).

358. 23 La. Ann. 365 (1871).

359. *Id.* at 366.

is that the contractor, who through his work has increased the value of the thing, should not be omitted in the distribution of the proceeds of that thing and is therefore not primed by the privilege of the vendor.³⁶⁰ Instead, the contractor's privilege is exercised in such a way as to give the contractor "the benefit of the increased value he has given to the property."³⁶¹

The present-day Private Works Act seems to have abandoned this "intelligent sense of justice" in favor of a rule ranking Private Works Act privileges against vendor's privileges and mortgages based strictly upon temporal priority. As revised in 1981, the Private Works Act³⁶² provides that privileges in favor of claimants under the Act are inferior to mortgages and vendor's privileges "that are effective against third persons before the privileges granted by [the Act] are effective."³⁶³ The Official Comments to this provision of the Private Works Act observe that this provision is not intended to change the law and "leaves to the general law the matter of determining when a mortgage or vendor's privilege is effective."³⁶⁴ However, the formulation of the predecessor statute was different, and perhaps materially so. The privileges arising under that statute were ranked behind those bona fide mortgages and vendor's privileges that had been "duly recorded before the work or labor is begun."³⁶⁵ Thus, actual recordation at the moment of commencement of the work—rather than effectiveness against third persons—was the paramount consideration; the possibility that a vendor's privilege might take effect against third persons from the moment of the act of sale, provided that timely filing later occurs, was unimportant.

Under the present Private Works Act, if an act evidencing a bona fide vendor's privilege is actually recorded before work begins on the immovable, there is little doubt that the vendor's privilege will have priority. But, suppose that, on a Friday afternoon, a closing occurs in which a purchaser acquires an immovable under an act of credit sale that is not recorded in the conveyance or mortgage records until the following Monday morning. In the meantime, on Saturday, a contractor hired by the new owner begins

360. *Id.*

361. *Id.*

362. See LA. REV. STAT. ANN. § 9:4821 (Supp. 2015).

363. Laborer's privileges under the Private Works Act outrank all mortgages and vendor's privileges, irrespective of the order in which the competing rights arise or are made effective against third persons. *Id.* § 9:4821(A)(2). Thus, the issues discussed in this section are not applicable to laborer's privileges.

364. *Id.* cmt. d.

365. Act No. 298, 1926 La. Acts 552, 559 (quoted in *Hortman-Salmen Co. v. White*, 123 So. 709, 710 (La. 1929)).

work for the construction of a building upon the immovable. The roofing subcontractor, who is not paid for work performed many months later, timely files a Private Works Act claim within 60 days after the work is substantially completed the following year. In a ranking dispute between this subcontractor and the unpaid vendor, who wins? The vendor's privilege was timely filed, but was it "effective against third persons" when work began?

The case that most nearly answers this question is *Security Homestead Ass'n v. Schnell*.³⁶⁶ It should be borne in mind, however, that the case was decided under the former version of the Private Works Act, which, as pointed out above, required actual prior recordation in order for bona fide mortgages and vendor's privileges to outrank Private Works Act privileges. Under the facts of that case, the defendant purchased an immovable under an act of credit sale that was recorded within the period prescribed by Civil Code article 3274.³⁶⁷ For reasons that were not entirely clear, he had apparently obtained materials from two materialmen prior to the time that he became the owner of the immovable.³⁶⁸ The court held that, with respect to materials supplied before the date of the act of credit sale, no materialman's privilege could arise because the materialmen did not contract with the owner or lessee as required by the Private Works Act.³⁶⁹ However, with respect to purchases of materials made by the defendant on or after the date of execution of the act of credit sale, a materialman's privilege arose and, by virtue of the clear language of the Private Works Act, that privilege was superior to the unrecorded vendor's privilege.³⁷⁰ The majority opinion did not cite or discuss Civil Code article 3274 or its temporal filing requirement, though it is clear from the

366. 232 So. 2d 898 (La. Ct. App. 1970). See also *Conservative Homestead Ass'n v. Boyle*, 135 So. 663 (La. 1931). However, in *Conservative Homestead Ass'n*, the vendor's privilege in favor of a building and loan association was acquired after work had begun, and the court had no difficulty ranking it behind privileges arising from a work that had already begun when the vendor's privilege was acquired. No consideration was given to Civil Code article 3274, and the opinion did not discuss whether timely recordation of the vendor's privilege would have given it priority. Based on the reasoning set forth in *Lawyer's Title Insurance Corp. v. Valteau*, it appears that timely recordation would not have made a difference under article 3274 anyway, because the building and loan association's (i.e., the vendor's) own title was burdened by the inchoate liens arising from the work at the time of the vendor's privilege was created.

367. *Security Homestead Ass'n*, 232 So. 2d at 899.

368. *Id.*

369. *Id.* at 900-01.

370. *Id.* at 901.

facts of the case that the vendor's privilege was recorded in a timely manner.³⁷¹

The dissent pointed out the incongruity in allowing a third person *to benefit* from an unrecorded sale while at the same time *protecting* the third person from the vendor's privilege arising under the unrecorded sale.³⁷² In the view of the dissent, where work is in continuous progress prior to the time the party contracting as owner actually becomes owner, the work is considered to have commenced at the moment that registry of his purchase in the conveyance records makes him owner *quoad third persons*.³⁷³ The only way the vendor's privilege could prime the materialman's privilege would be if the vendor could show that his privilege was recorded in the mortgage records *before* the moment of registry of the sale in the conveyance records. This is something the vendor could not do under the facts of the case, and perhaps cannot do under any facts unless he caused his act of credit sale to be recorded in the mortgage records before it is recorded in the conveyance records. The reason that the dissenting judge dissented is that he believed the materialman's privilege should have been given effect only with respect to materials delivered after the date of recordation of the act of sale in the conveyance records.³⁷⁴ The dissent did discuss the effect of article 3274, but dismissed that article on the basis that it protects the vendor only against intervening *mortgages*, not against other privileges.³⁷⁵

Of course, *Security Homestead* was decided under a prior version of the Private Works Act, which provided that prior *recordation* of a vendor's privilege was the determining factor. Likely the reason that the current version of the Private Works Act

371. *See generally id.*

372. *Id.* at 901–02 (Redmann, J., dissenting).

373. *Id.* at 903.

374. *Id.* at 902.

375. To the extent that the dissenting opinion suggests that Civil Code article 3274 is the article that gives the holder of the vendor's privilege priority over a mortgage, it seems incorrect. Quite to the contrary, article 3274 is a *limitation* upon the priority that a vendor's privilege enjoys over a mortgage by virtue of article 3186, which ranks a creditor holding a privilege over other creditors, even those holding mortgages. The priority of one privilege over another is not dealt with by article 3274, or even article 3186, but rather by other articles of the Civil Code that provide no guidance on how to rank a Private Works Act privilege. The dissent is, however, correct both that the ultimate question is whether a vendor's privilege outranks a materialman's privilege and that this ranking is fixed by section 9:4812. At the time *Security Homestead* was decided, that statute resolved the priority based on whether the vendor's privilege was recorded prior to the moment work began. Under the present version of the Private Works Act, the issue is whether the vendor's privilege was effective against third persons before work began.

shifted the focus from actual recordation of competing mortgages to their effectiveness against third persons was not any conscious consideration of the effective date of timely filed vendor's privileges, but rather was a recognition of the rule that mere recordation is insufficient to make a collateral mortgage effective against third persons; issuance of the collateral note is also required.³⁷⁶ At the time of the 1981 revision of the Private Works Act, *American Bank & Trust Co. v. F & W Construction*³⁷⁷ had only recently been decided. Construing the former statute, which focused upon whether the competing mortgage was a bona fide mortgage or vendor's privilege recorded before work began, the court held that a collateral mortgage recorded prior to the commencement of work but without contemporaneous pledge of the collateral note was not a bona fide mortgage that would prime privileges arising out of work begun before the collateral note was pledged.³⁷⁸

There does not appear to be any case decided under the current Private Works Act considering the issue of whether a vendor's privilege that arises before work begins and is filed timely after work begins is "effective against third persons" before work begins. The view that it is not would appear to be supported by a plain reading of article 3273, which provides that privileges are effective against third persons from the date of the recording of the act or evidence of indebtedness secured by the privilege. However, the apparent plainness of the language of article 3272 might be deceptive, for if it truly means precisely what it seems to say, Private Works Act privileges themselves would not be effective against third persons during the period before a statement of claim or privilege is filed of record.³⁷⁹ Ironically, the very principles by which the courts held that a timely but later filed Private Works Act privilege could constitutionally prime a pre-existing mortgage might now be used to support an argument that a vendor's privilege that is recorded within the time set forth in article 3274 outranks Private Works Act privileges, even though the vendor's privilege is not recorded at the time work began. To understand this point, a review of early

376. See LA. REV. STAT. ANN. § 9:5551 (2007) (codifying previous jurisprudence); see also Nathan & Marshall, *supra* note 103.

377. 357 So. 2d 1226 (La. Ct. App. 1978). The case is specifically referred to in comment (d) to section 9:4821.

378. *Id.* at 1229. For a discussion of the application of this rule under the current statute, see Michael H. Rubin, *Ruminations on the Louisiana Private Works Act*, 58 LA. L. REV. 568, 610 (1998).

379. Of course, this conflict could be removed by application of the familiar rule that later, more specific legislation, such as the Private Works Act, prevails. Constitutional considerations, discussed more fully in the text below, originally precluded this simple resolution.

cases involving constitutional challenges to the Private Works Act is necessary.

In *Gleissner v. Hughes*,³⁸⁰ the Court considered an objection to the constitutionality of the 1916 predecessor to the Private Works Act, which at the time provided that a privilege arising under its provisions and recorded within 45 days after the owner's acceptance of the work had priority over all other privileges or encumbrances, even those that had been recorded before work began. At the time, the Louisiana Constitution of 1913³⁸¹ provided that "[n]o mortgage or privilege on immovable property shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law."³⁸² The Court held that, although there is no doubt that the privileges asserted by the Private Works Act claimants could not affect third persons unless recorded, the constitutional provision leaves to the Legislature a determination of the manner and time within which they must be recorded in order to bind third persons.³⁸³ Citing article 3274 of the Civil Code as an example of another instance in which the Legislature had allowed a delay for recording a privilege, the Court held that the 1916 act was simply an enlargement of the filing period otherwise provided in the general rule expressed in article 3274.³⁸⁴ The *Gleissner* case was followed four years later in *Capital Building & Loan Ass'n v. Carter*.³⁸⁵ Citing its earlier holding in *Gleissner* and the

380. 95 So. 529 (La. 1922).

381. LA. CONST. art. XIX, § 19 (1921).

382. The identical provision had been contained in Article 176 of the 1879 Constitution and later appeared in Article XIX, Section 19, of the Constitution of 1921. This provision was continued in force as a statute following the adoption of the Constitution of 1974 and still exists as statutory law today as Article XIX, Section 19, of the Constitution Ancillaries. It should be noted that the principle espoused in this provision, but *without* inclusion of the temporal element, appears in the 2005 enactment of Civil Code article 3338. Whether the omission of the reference to the time permitted for recordation is significant or even intentional, the 2005 revision of the law of registry did not purport to repeal or modify Article XIX, Section 19, of the Constitution Ancillaries.

383. *Gleissner*, 95 So. at 532.

384. *Id.* at 533.

385. 113 So. 886 (La. 1927). Under the facts of the case, the lot owner, acting as his own contractor, erected a residence on the lot using materials supplied by two materialmen. After completion, he sold the property to a building and loan association, which immediately resold the property to a third person, retaining a vendor's privilege which was timely recorded. Three months after completion, the materialmen filed claims under the 1922 predecessor to the Private Works Act, which generally provided for a 30-day lien filing period but was unclear as to what the filing period was in the case of a work performed by the owner himself.

analogous provision of the Constitution of 1921,³⁸⁶ the Court held that:

Under this provision a lien or privilege *may affect third persons during the period in which it is not of record*, if, eventually, it is recorded in the manner and the time prescribed by law.³⁸⁷

The Court found that the 30-day filing requirement that existed under the 1922 predecessor to the Private Works Act applied and that, because the materialmen did not file within it, they held no privilege on the property.³⁸⁸ Because the Court held that the materialmen had no privilege, what it said about the effect against third persons of unfiled privileges during the period prescribed for their filing might rightly be considered dicta; however, that objection cannot be raised to the nearly contemporaneous holding of the Court in *Central Lumber Co. v. Schroeder*,³⁸⁹ in which the materialman did in fact file within the 30-day filing period. According to the Court, “since the privilege was recorded within the time and in the manner prescribed by law, *it affected third persons during the period in which it was not of record.*”³⁹⁰ As authority for this proposition, the Court cited the constitutional provision as well as its prior holdings in both the *Gleissner* and the *Capital Building & Loan Association* cases.³⁹¹ Professor Daggett interprets these holdings as establishing that the principle that the Legislature has the prerogative of prescribing the time within which privileges on immovables must be recorded, and, if a privilege is recorded within the prescribed time, it is effective against third persons *during the period of time that it is not of record.*³⁹²

386. LA. CONST. art. XIX, § 19 (1921).

387. *Carter*, 113 So. at 888 (emphasis added).

388. *Id.* at 888–89.

389. 114 So. 644 (La. 1927).

390. *Id.* at 646 (emphasis added).

391. Though not cited in any of the Louisiana Supreme Court decisions discussed above, the Orleans Court of Appeal had previously reached a similar holding based upon nearly identical reasoning. See *Pratt v. Damon Castle Hall Co.*, 2 Pelt. 67, 70 (La. Ct. App. 1918). Ruling on the effectiveness of a paving lien recorded within the 60-day period allowed for its recordation, the court in *Pratt* analogized to article 3274 and held that “[t]he property was also affected with the privilege, without recordation, *as regards third persons* during sixty days after the issuance of the certificate, because the law, by its very letter, accorded the contractor these sixty days within which to record his privilege.” *Id.* at 72–73 (emphasis added).

392. See DAGGETT, *supra* note 32, § 72, at 296–321.

Interestingly, this line of cases impresses upon the 1870 Code a meaning that was explicitly stated in the 1825 Code³⁹³ but was removed in the 1870 revision, which substituted in place of that explicit statement a provision, found in article 3273, that privileges are valid against third persons from the date of the recording of the act or evidence of the indebtedness.³⁹⁴ That change might, however, be explained by the fact that the 1870 Code originally shortened the period for recording a vendor's privilege to the very day on which the act of sale was passed; thus, there was no need for the provision on retroactivity of a timely filing.

Prior to the 1981 revision of the Private Works Act, *Gleissner* and its progeny would have been unavailing to a vendor holding a privilege that was filed in a timely manner but was not of record at the moment work began because the Private Works Act specifically required that a mortgage or vendor's privilege be *of record* at the time work began in order for the mortgagee or vendor to have priority over a Private Works Act claimant. However, since the 1981 revision to the statute, which now requires simply that the vendor's privilege be *effective against third persons* at the time work begins, a vendor could seize upon these holdings and turn back around against a Private Works Act claimant the very reasoning that allowed the Private Works Act claimant to have priority over pre-existing interests in the first place.

The 1981 revision was likely intended simply to confine the field of competing mortgages and privileges that would prime a Private Works Act privilege to those that are not merely of record but are also actually effective against third persons. Except in the case of a collateral mortgage, the two requirements are practically co-extensive anyway.³⁹⁵ Ironically, however, the formulation presently used in the statute may actually have increased the field of competing vendor's privileges that will have priority to include both previously filed vendor's privileges as well as those later filed vendor's privileges whose period for filing under article 3274 is yet unexpired at the moment work begins.

The vendor can make a convincing argument that the Legislature has already chosen to favor pre-existing vendor's privileges over most Private Works Act privileges and that the Legislature's policy choice is furthered, not frustrated, by

393. Articles 3240 and 3241 of the 1825 Code provided that a privilege was valid against third persons *from the date of the act* if recorded within a specified period of time. LA. CIV. CODE arts. 3240–3241 (1825).

394. See generally *Wheelright v. St. Louis, N.O. & O. Canal Transp. Co.*, 17 So. 133 (1895).

395. See *supra* note 363; see also *Nathan & Marshall*, *supra* note 103.

application of this rule to those vendor's privileges that are filed within the short window of time permitted by article 3274. Even where the vendor's privilege is unrecorded at the time work begins, the Private Works Act claimant would be hard-pressed to show that he relied on the absence of the filing of the vendor's privilege in the mortgage records, because in modern times the absence of the filing of the credit sale in the mortgage records almost always implies a lack of recordation of the instrument in the conveyance records. If there is no recordation of an act translatif of title in favor of the owner who has contracted the work, how can the claimant claim to be relying on the public records at all? Moreover, Private Works Act claimants themselves benefit from relatively long periods of time in which their privileges are effective against third persons without any recordation.³⁹⁶ Why should vendors, to whom the law also expressly gives a period of time for recordation of their privileges, not also be permitted the same benefit?

On the other hand, the Private Works Act claimant seems to have the advantage in arguing the black letter of the law: His privilege is effective from the moment work begins³⁹⁷ and outranks all competing mortgages and privileges that were not effective against third persons at that moment.³⁹⁸ Article 3273, which applies to other privileges, provides that privileges are effective against third persons from the date of recording.³⁹⁹ The first sentence of article 3274 unqualifiedly states that privileges—including vendor's privileges—are not effective against third persons "unless recorded in the manner required by law."⁴⁰⁰ A close reading of the article reveals that the second sentence of this article, which permits the privileged creditor a period of time to record his privilege after it has arisen, is *not* necessarily an exception to the rule espoused in the first sentence, but rather is an exception to the rule, expressed in article 3186, that privileges by their nature outrank *mortgages*.⁴⁰¹ The second sentence says nothing about the ranking of privileges against other privileges and by its terms does not purport to make unfiled vendor's privileges effective against third persons from the moment of the sale if recorded within the period of time allowed in the article.⁴⁰² Though

396. See LA. REV. STAT. ANN. §§ 9:4820(A), 4822 (Supp. 2015).

397. The privilege is effective when notice of contract is filed, if earlier. See *id.* § 9:4820(A)(1).

398. *Id.* §§ 9:4820(A), 4821.

399. LA. CIV. CODE art. 3273 (2015).

400. LA. CIV. CODE art. 3274 (2015).

401. *Id.*

402. *Id.*

that rule was found in prior codes, it was suppressed in the 1870 revision.⁴⁰³

If the law is that a timely but later filed vendor's privilege is primed by Private Works Act privileges arising out of a work commenced during the period allowed by article 3274 for filing the vendor's privilege, an anomaly results when there happens to be a pre-existing judicial mortgage against the vendee. The vendor's privilege, even though filed in a timely manner, would nonetheless be primed by the pre-existing judicial mortgage against the vendee, contrary to the result that is otherwise mandated by *Lawyer's Title Insurance Corp. v. Valteau*.⁴⁰⁴ The reason is that the previously filed judicial mortgage would attach at the instant the vendee acquires the property⁴⁰⁵ and would therefore prime Private Works Act privileges arising out of a work subsequently commenced by the vendee. Ordinarily, this judicial mortgage would, under the holding of *Valteau* and by operation of article 3274, be inferior to a later but timely filed vendor's privilege. Unfortunately for the vendor, however, his priority would rank behind all Private Works Act privileges and also behind all mortgages that were effective against third persons before work began because, under the rule that we are assuming to exist, his privilege was not effective against third persons at the time work commenced. Thus, under the ranking provisions of the Private Works Act,⁴⁰⁶ his vendor's privilege would be last in ranking. Though this situation might at first blush seem to constitute a vicious circle, it is actually a simple re-ordering of ranking based upon the priority rules contained in the Private Works Act. What makes the situation all the more anomalous is that this re-ordering of priorities results solely from the fortuity of whether, at the time of foreclosure, there happens to be an unpaid Private Works Act claimant who may be owed an insignificant amount of money. In the absence of such a claimant,

403. The broader issue of the effectiveness of a vendor's privilege against any third person who acquires rights in the property during the period prescribed for its filing under article 3274 could arise in other contexts as well, such as when the buyer alienates the property during that period. There are statements in a number of cases to the effect that the time limitation of the second sentence of article 3274 "relates only to the effect as to mortgages existing at the date of the privilege contract" and does not concern subsequent purchasers. *Gay v. Bovard*, 27 La. Ann. 290, 291 (1875). See also *McIlvaine v. Legare*, 34 La. Ann. 923 (1882). There is no issue, however, when mortgages, whether conventional or judicial, attach to the property before or during the period, for the second sentence of article 3274, in tandem with article 3186, gives a timely filed vendor's privilege priority over them.

404. 558 So. 2d 1319 (La. Ct. App. 1990).

405. *Gallaugh v. Hebrew Congregation*, 35 La. Ann. 829 (1883).

406. LA. REV. STAT. ANN. § 9:4821 (Supp. 2015).

the Private Works Act has no application, and the vendor would rank ahead of the holder of the pre-existing judicial mortgage. Of course, if the rule is that the timely but later filed vendor's privilege outranks Private Works Act privileges, the anomaly is avoided: the vendor's privilege ranks first, followed by the pre-existing judicial mortgage, followed by the Private Works Act privileges. The vendor's privilege and judicial mortgage would rank between themselves in the same order that would apply in the absence of a Private Works Act privilege.

A similarly anomalous reordering of priorities would arise if an act of credit sale is recorded in the mortgage records within the period prescribed by article 3274 but, in the interim before its recordation occurs, the new owner records a conventional mortgage and begins work on the immovable, in that order. Under article 3274, the vendor's privilege would normally outrank the conventional mortgage, even though the mortgage was recorded first. However, application of the Private Works Act would re-order the priorities as follows: (1) laborer's privileges, because the Private Works Act accords them priority over all other privileges and mortgages irrespective of any temporal consideration; (2) the conventional mortgage, because it was recorded and therefore effective against third persons before work began; (3) other Private Works Act privileges; and (4) the vendor's privilege, because, based on the assumption we are making, it was not effective against third persons until the moment of recordation. Again, the anomaly is avoided if the rule is that the timely but later filed vendor's privilege outranks non-laborer privileges under the Private Works Act. The ranking would be: (1) laborer's privileges, for the same reason indicated above; (2) the vendor's privilege because, under the rule we are assuming to exist, it was effective against third persons when work began and also because its timely recordation causes it to outrank the conventional mortgage; (3) the conventional mortgage, because it was recorded and therefore effective against third persons before work began; and (4) other Private Works Act privileges. The vendor's privilege and conventional mortgage would rank between themselves in the same order that would apply in the absence of a Private Works Act privilege.

XI. CONCLUSION

So how do the two vendor's privileges fare today? The older of them has atrophied; the younger remains nearly as vibrant as ever.

From its inception, the vendor's privilege on movables has afforded only precarious protection to the seller, given that it has always been a mere right of preference that is extinguished if the

buyer alienates the thing subject to the privilege and delivers it to a third person. Jurisprudence that has evolved over the last few decades seems to dictate the conclusion that a vendor's privilege is similarly extinguished if the thing subject to the privilege becomes a component part of an immovable, at least in cases where the privilege becomes in conflict with rights that third persons have or acquire in the immovable. Once favored by the legislator, who often statutorily subordinated other special privileges to it, the vendor's privilege was dealt a double blow by Louisiana's adoption of Article 9 of the Uniform Commercial Code. First, Article 9 made it quite easy for a vendor to obtain a purchase money security interest, through the simple expedient of having the buyer sign a short agreement stating that a security interest is granted for the unpaid purchase price. The purchase money security interest so created is accorded very favorable treatment, as it outranks most pre-existing security interests,⁴⁰⁷ and, in the case of consumer goods, is automatically perfected without the necessity of filing any financing statement.⁴⁰⁸ Of course, the mere creation of another convenient and powerful form of security would not, of itself, have caused the vendor's privilege on movables to lose its allure. The second blow was the contemporaneous adoption of Louisiana Revised Statutes section 9:4770, providing that vendor's privileges are subordinate to all security interests, even those arising later and those that are never perfected. Thus, the vendor's privilege on movables is now an anemic form of security indeed. Nevertheless, it still allows the vendor to be preferred over unsecured creditors, and its existence permits the unpaid seller to obtain a pre-judgment seizure under a writ of sequestration.⁴⁰⁹

In contrast, the vendor's privilege on immovables remains as useful as ever. Though the preference that it affords the vendor over the general privileges arising under the Civil Code is perhaps now of only marginal benefit, because general privileges themselves have fallen into disuse, the ranking that the vendor's privilege has over mortgages—particularly pre-existing judicial mortgages—continues to be substantially beneficial. Once recorded, the vendor's privilege on an immovable is a powerful real right that follows the immovable into whatever hands it may pass. Its benefits and protections remain sufficiently attractive that, in recent years, proposals have been made to make them available even to creditors who are not sellers.⁴¹⁰ Whether those proposals will continue to be made, or if

407. *Id.* § 10:9-324.

408. *Id.* § 10:9-309(1).

409. *See supra* note 99.

410. *See supra* note 75.

made will ultimately succeed, will be known only with the passage of time.

Perhaps our long experience with vendor's privileges allows us to draw conclusions that are valid with respect to the concept of privileges in general. Where privileges, such as those on movables, are allowed to proliferate, and to exist without a system of registry with the result that their effectiveness against third persons is of necessity severely restricted, the security that they afford becomes so weak that the regime under which they exist is ultimately replaced by another system that more effectively protects the rights of the creditor and third persons alike. Accordingly, the Uniform Commercial Code, with its simplified form of a single security interest that is easily made effective against third persons through a mechanism of publicity, has nearly supplanted the law of privileges on movables, the vendor's privilege included. On the other hand, where privileges, such as those on immovables, are relatively few in number, are subjected to a system of registry, and are granted the status of real rights, they can continue to serve as effective security for the privileged creditor without unfairly prejudicing the rights of third persons. The vendor's privilege on immovables endures as a fitting example. *Adheret visceribus rei.*